CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 76

THE UNITED STATES OF AMERICA, PETITIONER

vs.

GENERAL MOTORS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 3, 1944
CERTIORARI GRANTED MAY 29, 1944

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Record from D. C. U. S., Northern District of Illinois	1	1
Caption [omitted in printing]	1	1
Petition for condemnation	2	1
Order granting possession	5	3
Summons and marshal's return	6	4
Appearance for Defendant	7	5
Appearance for Defendant	8	5
Order re trial, etc	9	6
Appearance for Defendant	10	6
Report of proceedings	10	7
Caption and appearances	10	7
Colloquy	10	7
Testimony of—		
Harry S. Cutmore	13	9
Erwin H. List	24	19
Charles R. Thorp	28	22
Erwin H. List (recalled)	44	36
Charles Essex	45	37
Colloquy	46	38
Defendant's offer of proof	49	41
Testimony of—		
Charles R. Thorp (recalled)	58	48
Charles Essex (recalled)	62	52
Plaintiff's tendered instructions	67	56
Colloquy	68	58

	Original	Print
Record from D. C. U. S., Northern District of Illinois—Con.		
Report of proceedings—Con.		
Defendant's tendered instructions	72	61
Court's instructions to jury	80	67
Government's exhibits:		
No. 1—Letter, March 29, 1942, Stimson to Attorney General	83	70
Exhibit A—Description of premises	85	72
No. 2—Picture of building	87	72
Defendant's exhibits:		
No. 1—Letter, March 13, 1942, List to U. S. Division Engineer	89	72
No. 3—Summary of lease	91	74
No. 4—Operating expense	92	74
No. 6—Summary of sublease	93	75
Verdict	93	75
Judgment upon verdict	94	76
Order vacating judgment	95	76
Order re original exhibits, etc	96	77
Notice of motion to amend petition	96	77
Order re amendment to petition	97	78
Amendment to petition	98	78
Declaration of taking	99	79
Order for disbursement	102	81
Judgment	102	82
Motion for new trial	104	83
Order overruling motion for new trial	106	85
Notice of appeal	107	85
Statement of points to be relied upon	108	86
Designation of record	110	88
Clerk's certificate [omitted in printing]	112	89
Proceedings in U. S. C. C. A., Seventh Circuit	114	90
Opinion, Major, J	114	90
Dissenting opinion, Minton, J	123	99
Judgment	124	100
Clerk's certificate	125	101
Order allowing certiorari	126	102

1 [Caption omitted.]

2 In the District Court of the United States, Northern District of Illinois, Eastern Division

No. 48126

UNITED STATES OF AMERICA

vs.

93,673 SQUARE FEET OF FLOOR SPACE, MORE OR LESS, IN CHICAGO, COOK COUNTY, ILLINOIS, CLEARING INDUSTRIAL DISTRICT, INC., GENERAL MOTORS CORPORATION AND ARGONAUT REALTY DIVISION,

Petition for condemnation

Filed June 8, 1942

To the Honorable Judges of the District Court of the United States of America for the Northern District of Illinois:

Now comes the United States of America, petitioner herein, by its attorney, J. Albert Woll, United States Attorney for the Northern District of Illinois, at the direction of and on behalf of the Attorney General of the United States of America, pursuant to the request of the Secretary of War, and files this, its Petition for Condemnation herein, and represents unto the Court as follows:

I

That pursuant to the provisions of the Act of Congress, approved March 27, 1942, known as the Second War Powers Act, 1942 (Public Law 507, 77th Congress), the Secretary
3 of War is authorized to cause proceedings to be instituted to acquire by condemnation any temporary use of real property that shall be deemed necessary for military or other war purposes; such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357), or any other applicable Federal Statute and upon or after the filing of the condemnation petition, immediate possession of such real property may be taken, occupied, used and improved by the United States of America for the purposes contained in said Act.

II

That pursuant to the authority contained in said Act of Congress, the Secretary of War has requested the Attorney General of the United States to cause proceedings to be instituted in this Court to acquire, by condemnation, temporary use of the real

property hereinafter described and for an order directing the taking of immediate possession thereof.

III

That the Secretary of War has requested the condemnation of the use of the real property for a term of years ending June 30, 1943.

IV

That the real property, which the Secretary of War has deemed necessary to be acquired for military or other war purposes, is described as follows:

Premises known and described as 5001 West 65th and 6510–40 South Lavergne Avenue, comprising approximately 93,673 square feet of floor space, being the Westerly portion of the one story building located at the Southwest corner of 65th Street and Lavergne Avenue, Chicago, Illinois, and being that portion of said one story building not presently under lease to the United States.

4

V

That the names of the purported owners of said real property, or persons otherswise interested therein, who are made parties defendant hereto are:

Clearing Industrial District, Inc.
General Motors Corporation
Argonaut Realty Division.

Wherefore, your petitioner prays that this Honorable Court enter an order condemning the temporary use in the real property herein described, together with all improvements thereon and appurtenances thereunto belonging, and granting its right to take immediate possession, occupy, use, and improve said real property for military or other war purposes, and

Your petitioner further prays that process issue to the following persons, who are made parties defendant hereto, to appear before this Court on the first day of the next July term thereof, to be held in the United States Court House, in the City of Chicago, County of Cook, State of Illinois, and then and there respond to these condemnation proceedings: Clearing Industrial District, Inc.: General Motors Corporation, and Argonaut Realty Division, and

Your petitioner further prays that the compensation which your petitioner shall pay for the temporary use of the real property, together with all improvements thereon and appurtenances thereunto belonging, may be determined and ascertained according to law; and that your petitioner may have such further and

other relief in the premises as the nature of its case shall require and as to your Honors shall seem meet.

J. ALBERT WOLL,
J. Albert Woll,
United States Attorney.

5 In the District Court of the United States

[Caption—48126.]

Order granting possession

Entered June 8, 1942

This cause coming on to be heard upon the petition and motion of the United States of America, by J. Albert Woll, United States Attorney for the Northern District of Illinois, and it appearing to the Court that this proceeding has been instituted at the request of the Secretary of War, acting pursuant to the provisions of the Second War Powers Act, 1942 (Public Law 507, 77th Congress), and under direction of the Attorney General, and that Clearing Industrial District, Inc., General Motors Corporation, and Argonaut Realty Division, having been made parties defendant hereto, and the Court being fully advised in the premises.

It Is Ordered that the temporary use of the real property, together with all improvements thereon and apurtenances thereunto belonging, described as follows:

Premises known and described as 5001 West 65th Street and 6510—40 South Lavergne Avenue, comprising approximately 93,673 square feet of floor space, being the Westerly portion of the one story building located at the Southwest corner of 65th Street and Lavergne Avenue, Chicago, Illinois, and being that portion of said one story building not presently under lease to the United States.

for the term of years ending June 30, 1943, be and hereby is condemned and taken by the United States of America for military or other war purposes, and the United States of America, its duly authorized officers and employees shall have the right to take immediate possession, occupy, use and improve said real property, and

It is further ordered that the Marshal shall forthwith serve a copy of this order upon each of the defendants named herein and upon every person found to be in possession of or upon said property.

Entered at Chicago, Illinois, this 8th day of June, A. D. 1942.

IGOE, *Judge.*

6 The District Court of the United States

[Caption—48126.]

Summons and return

Filed June 22, 1942

The President of the United States of America to the Marshal of the Northern District of Illinois, Greeting:

We command you to summon:

Clearing Industrial District, Inc.; General Motors Corporation; and Argonaut Realty Division, if found in your district, to be and appear before our Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division, on the first day of the next July 1942 Term thereof, to be holden at Chicago, in the District aforesaid, on the first Monday of July next, to appear in response to the petition for the condemnation of certain real estate therein described, filed by the United States of America as Action 48126.

And have you then and there this writ.

Witness:

The Honorable Michael L. Igoe, Judge of the District Court of the United States of America, at Chicago, Illinois, this 10th day of June, in the year of our Lord One Thousand Nine Hundred and Forty-two, and of our Independence the One Hundred and Sixty-sixth year.

[SEAL] HOYT KING, *Clerk.*

J. ALBERT WOLL,
U. S. Attorney,
450 U. S. Court House, Chicago, Illinois.

Marshal's return

Served this writ on the within named Clearing Industrial District, Inc., a corporation, by delivering a copy thereof to H. R. Stevens, Secretary of said corporation, this 12th
7 day of June A. D. 1942. The President of said corporation not found in my district.

Served this writ on the within named General Motors Corporation, a corporation, by delivering a copy thereof to George L. Hay, Office Manager of Pontiac Motor Division of the General Motors Corporation, this 12th day of June A. D. 1942. The President of said corporation not found in my district.

Served this writ on the within named Argonaut Realty Division, by delivering a copy thereof to George L. Hay, Office Mana-

ger, of Pontiac Motor Division of the General Motors Corporation, this 12th day of June A. D. 1942. The President of Argonaut Realty Division not found in my district.

WILLIAM H. McDONNELL,
United States Marshal,
By WM. RAFF, *Deputy.*

3 Ser	6.00
In lieu	20
	6.20

In the District Court of the United States

[Caption—48126.]

Appearance

Filed June 30, 1942

We hereby enter the appearance of the defendant Clearing Industrial District, Inc., and that of ourselves as its attorneys in the above cause.

WINSTON, STRAWN & SHAW,
Attorneys for Defendant, Clearing Industrial District, Inc.

WALTER H. JACOBS, *Of Counsel.*

8 In the District Court of the United States

[Caption—48126.]

Appearance

Filed July 1, 1942

To HOYT KING,
Clerk of the Above Entitled Court.

SIR: Kindly enter my appearance in the above-entitled matter as the attorney for General Motors Corporation, Argonaut Realty Division, one of the Defendants named in the Summons served in connection with the above-entitled cause.

Dated June 30, 1942.

HENRY M. HOGAN,
Henry M. Hogan,
Attorney for General Motors Corporation, Argonaut Realty Division,
3044 West Grand Boulevard, Detroit, Michigan,
Trinity 2-4800.

HARRY S. BENJAMIN, JR.,
Harry S. Benjamin, Jr.,
Of Counsel.

To J. ALBERT WOLL and CLARENCE W. BEATTY, JR.,
Office of the United States Attorney,
450 U. S. Court House, Chicago, Illinois.

Please take notice that I have this 3[illegible] day of June 1942, entered my appearance in the above-entitled matter as the Attorney for General Motors Corporation, Argonaut Realty Division, one of the Defendants named in the Summons served in connec-
9 tion with the above-entitled cause. I request that copies of all pleadings, notices and papers hereafter filed in this matter be served upon me.

HENRY M. HOGAN,
Henry M. Hogan,
Attorney for General Motors Corporation, Argonaut Realty Division,
3044 West Grand Boulevard, Detroit, Michigan,
Trinity 2-4600.

HARRY S. BENJAMIN, JR.,
Harry S. Benjamin, Jr.,
Of Counsel.

In the District Court of the United States

[Caption—48126.]

Order re trial etc.

Entered Nov 23, 1942

On motion of defendants attorneys, it is ordered that this cause be and the same is hereby reset for trial on December 14, A. D. 1942, and it is further ordered that leave be and the same is hereby given Messrs. Preston Boyd and Morris I. Leibman to file herein their appearance as additional counsel for the defendant, General Motors Corporation.

10. In the District of the United States

[Caption—48126.]

Appearance

Filed Nov. 23, 1942

We hereby enter the appearance of Preston Boyden and Morris I. Leibman as additional attorneys for the defendant, General Motors Corporation.

Dated: November 23, 1942.

PRESTON BOYDEN,
MORRIS I. LEIBMAN.

In the District Court of the United States

[Caption—48126.]

Report of proceedings

Filed May 17, 1943

Proceedings had and evidence taken in the above-entitled cause before the Honorable Michael L. Igoe, one of the judges of said court, and a jury, in his courtroom in the United States Courthouse, at Chicago, Illinois, commencing on Thursday, January 21, A. D. 1943, at 10:00 o'clock a. m.

Present: Mr. J. Albert Woll, U. S. District Attorney, by Mr. Clarence W. Beatty, Jr., Special Asst. U. S. Attorney, appeared on behalf of plaintiff. Messrs. Taylor, Miller, Busch & Boyden, by Mr. Preston Boyden, and Mr. Harry Benjamin (Detroit, Michigan), appeared on behalf of defendant General Motors Corporation.

Whereupon the Plaintiff, to maintain the issues on its behalf, introduced the following evidence, to wit:

Colloquy

Mr. BEATTY. Will you mark this certified copy of a
11 letter and plat Government's Exhibit 1, and this photograph as Government's Exhibit 2, for identification.

(Said documents were marked accordingly by the reporter.)

Mr. BEATTY. If the Court please, I offer in evidence as Government's Exhibit 1 the certified copy of a letter from the Honorable Henry L. Stimson, Secretary of War, to the Attorney General, dated May 29, 1942, requesting the condemnation of a term of years ending June 30 of 93,673 square feet of floor space, more or less, in Cook County, Illinois, for use in connection with the establishment of a Signal Corps Depot in the General Motors Building, Chicago, Illinois, and the plat marked Exhibit B which is a part of the letter.

The COURT. Any objection?

Mr. BOYDEN. No objection.

The COURT. It may be admitted.

(Which said document, so offered and received in evidence, was marked "Government's Exhibit 1," and is in words and figures as follows, to wit:)

Mr. BEATTY. If your Honor please, by stipulation with Mr. Boyden, I offer a photograph marked "Government's Exhibit 2" in evidence.

Mr. BOYDEN. No objection.

The COURT. It may be admitted.

(Which said document, so offered and received in evidence, was marked "Government's Exhibit 2," and is in words and figures as follows, to wit:)

Mr. BEATTY. If your Honor please, I should like to read the letter marked "Government's Exhibit 2":

"The Honorable, The ATTORNEY GENERAL, *Washington, D. C.*

"DEAR MR. ATTORNEY GENERAL: It is necessary and advantageous to the interest of the United States that certain interests in lands located in Cook County, State of Illinois, be acquired by the United States of America for use in connection with the establishment of a signal corps depot in the General Motors Building, Chicago, Illinois.

"Therefore, pursuant to the provisions contained in the Act of Congress approved August 18, 1930 (26 Stat. 316), as
12 amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 516; 50 U. S. C. sec. 171), and March 27, 1942 (Public Law 507—77th Congress), which Acts authorize the acquisition of land for military or other war purposes, and the Act of Congress approved April 28, 1942 (Public Law 598—77th Congress), which Act appropriated funds for such purposes, it is requested that you cause the necessary proceedings to be instituted for the condemnation of a term of years ending June 30, 1943. The interests in land to be acquired comprise 93,673 square feet of floor space, more or less, situate in Cook County, Illinois, and are more particularly described in the inclosed Exhibit "A" and on the inclosed map entitled Exhibit "B." The names of the purported owners of said interests in land are set forth in the inclosed Exhibit "A."

"The Act of Congress approved April 28, 1942, supra, appropriated funds for this acquisition.

"The afore-mentioned interests in land are to be utilized to provide for additional storage space and the utmost haste in expediting this project is vital to the successful prosecution of the war. It is requested that pursuant to the provisions of the Act of Congress approved March 27, 1942 (Public Law 507—77th Congress), you procure an order granting immediate possession of the aforesaid lands.

"Appraisals are being obtained under the supervision of Lt. Col. F. I. Kennedy, Division Real Estate Director, Great Lakes Division, McCormick Building, 332 South Michigan Avenue, Chicago, Illinois, and the probable date of availability of the appraisal reports can be obtained by your field representative from the Divi-

sion Real Estate Director. No arrangements have been made by this Department for the procurement of title evidence.

"Inclosed herewith are two additional copies of Exhibit "A" and five additional copies of Exhibit "B."

"Sincerely yours,

(Signed) HENRY L. STIMSON.
Secretary of War."

Mr. Cutmore.

13 HARRY S. CUTMORE, called as a witness herein, on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. BEATTY:

Q. Will you please state your name, sir?

A. Harry S. Cutmore.

Q. Where do you live, Mr. Cutmore?

A. 4257 North Avers Avenue, Chicago.

Q. What is your business or profession?

A. I am an appraiser and valuation engineer.

Q. Where do you maintain your office, Mr. Cutmore?

A. In the First National Bank Building, Chicago.

Q. How long have you been an appraiser and valuation engineer?

A. Over twenty-five years.

Q. Are you a member of any associations of your profession?

A. Yes, sir; I am a member of the American Institute of Real Estate Appraisers, member of National Association of Real Estate Boards, Chicago Real Estate Board, The Society of Residential Appraisers, the Western Society of Engineers.

Q. Mr. Cutmore, have you held any official positions which called for appraisal work?

A. Yes, sir. In 1928 I was employed as the director of revaluation by Cook County to conduct a reassessment of all of the property in Cook County, and individual appraisals were made of all of the properties in Cook County under my direction. I was later Chief Deputy Assessor of Cook County. Under my direction the real estate assessment of 1935 was executed, that being the quadrennial year.

Q. Mr. Cutmore, are you acquainted with the property involved in this proceeding?

A. Yes, sir.

Q. That is located at 65th and Lavergne?

A. Yes, sir.

Q. Did you make an appraisal of that property?

A. I did, sir.

Q. Mr. Cutmore, have you written any articles about appraisal work?

14 A. Yes, sir; I have written some articles which were published in real estate magazines, and a few years ago the University of Chicago, in conjunction with the American Institute of Real Estate Appraisers, conducted a course on appraisal work and I assisted in the writing of the text material for that course.

Q. Will you tell the Court and jury some of the clients that you have made appraisals for in your experience?

A. Well, I have made appraisals for many purposes and for many different types of property. I have made them for banks in Chicago. Practically all of the leading banks have employed me at one time or another. Most of the leading legal firms have used my services at some time or other, and we have made appraisals of a great many large industrial properties such as International Harvester, Corn Products Refining Company, and a great many of them. We have also done work for the United States Government and State of Illinois for highway-acquisition purposes, and also for the Forest Preserve and Cook County Highway Departments.

Q. In those appraisals, I take it that the purpose for which they were made was to determine a fair, market value or fair cash market value of various properties?

A. Yes, sir.

Q. At the time of the inquiry?

A. Yes, sir.

Q. Do you know Mr. Preston Boyden, Mr. Cutmore?

A. Yes, sir; I do.

Q. Have you ever done any work for Mr. Boyden?

A. Yes, sir; I have done work for his law office.

Q. Do you know the firm of Winston, Strawn & Shaw?

A. Yes, sir.

Q. Have you ever done any work for them?

A. Yes, sir.

Q. Mr. Cutmore, will you tell the jury briefly and generally what you did in making the appraisal of the property involved in this proceeding?

A. Well, we made an appraisal of the entire property because it is one single large one-story building on an irregular shaped piece of ground. There is approximately 300,000 square feet of ground used for railroad tracks, and so on, outside of the building, which contains approximately two hundred and some thousand square feet. We made an appraisal of the entire property in order to be able to compute the fair rental value of

15 the west portion, or the 93,000-odd square feet that were mentioned to me.

Q. Mr. Cutmore, will you describe in your own language what this building comprises; the type of structure that it is?

A. Well, the building is a one-story warehouse-type building. It is built of brick, some steel, and wood frame construction. The two street elevations on Lavergne Avenue and 65th Street are face brick, and the rear walls are of common brick. There is a boiler room occupying approximately 2,000 square feet in the southwest corner of the building. It is very typical of the type building which comprise this Clearing Industrial District.

Q. Mr. Cutmore, have you ever had any occasion to appraise properties in the Clearing Industrial District?

A. Yes, sir; I have made many appraisals in that district for various people, including the—— .

Q. Have you had any occasion to appraise properties of like construction in and about this property?

A. Yes, sir.

Q. Do you have an opinion as to the fair-rental value of this 93,673 square feet for a period of one year such as is the term taken in this proceeding?

A. Yes, sir.

Q. Will you please tell the Court and jury what that option is in dollars and cents?

A. Well, my opinion is that the fair rental value of that 93,000 odd square feet is 35 cents a square foot, and 93,673 square feet would make that $32,785.55 per year.

Q. In making the appraisal of which you just stated your opinion as to the fair rental value of the property for one year, what elements did you take into consideration in arriving at that opinion, Mr. Cutmore?

A. Well, I have my notes here on the method of computation. I put a valuation on the land and allowed a six per cent return on the land investment, placed the valuation on the improvements and allowed an eight per cent return on the improvements. I allowed four per cent a year for depreciation, giving the building a twenty-five year life. We allowed for the heating cost, repairs and maintenance, taxes, insurance and management, which gave me a total sum for total operating costs, taxes, depreciation,
16 and a return on the investment, and computing the actual rentable floor space, the computation came out to 35 cents a square foot.

Q. Or a total of how much per annum?

A. $32,785.55.

Mr. BEATTY. You may cross-examine.

Cross-examination by Mr. BOYDEN:

Q. Mr. Cutmore, you made this appraisal, I think you call it——

A. Yes, sir.

Q. On behalf of the Government?

A. Yes, sir.

Q. You know, don't you, that the United States Government leased property in this same building at a price of 40 cents a square foot six months before they condemned this piece, don't you?

Mr. BEATTY. I object, your Honor.

The COURT. What is the objection?

Mr. BEATTY. On the ground that it is immaterial that the United States leased other property in this vicinity.

Mr. BOYDEN. It is in the same building.

The COURT. I take it he is trying to arrive at how this witness reached the figures he has given here in this testimony. That is the purpose of your question?

Mr. BOYDEN. That is right, your Honor.

The COURT. Objection overruled. You may answer that question.

Mr. BEATTY. Exception.

The WITNESS. Yes, sir; I knew that.

Mr. BOYDEN. Q. You knew that, and you are still willing to come into this court and say to this jury that you think 35 cents a square foot is a better price than the Government made for itself when they made the lease?

A. Well, I had no opportunity to appraise the other 40-cent figure. People sometimes make mistakes and pay too much. My computation indicates 35 cents is fair.

Q. Yes. Now, you say your computation is on the whole building?

A. Yes, sir.

Q. Don't you know that the lease the Government made at 40 cents was on part of that building?

A. Yes, sir.

Q. You do? You knew that much about it?

17 A. Yes.

Q. And you were told about this Government lease, you knew they had made a lease at 40 cents, didn't you?

A. Yes, sir.

Q. You knew they made that in December 1941?

A. Yes, sir.

Q. And you are testifying that in June 1942, I take it, which is six months later, you say it is only a figure of 35 cents, and that that is a fair rental value, is that right?

A. Yes, sir.

Q. Do you think that the rental value in that territory had diminished in the six months so there had been a change in the territory?

A. No; I think the territory remains very stable.

Q. If anything, rentals have gone up in that territory during that six months period, isn't that true?

A. They might have.

Q. Have you ever bought, sold, or leased any property in Clearing?

A. No, sir.

Q. Have you ever bought, sold, or leased a factory building anywhere?

A. I have never actually done that; no, sir.

Q. Have you ever built or owned a factory building?

A. No, sir.

Q. Will you tell me what is the building on the north of this property?

A. The building that adjoins it on the north?

Q. Yes.

A. Well, I would have to refer to my file. I can't keep all those things clear in my mind. I have a map on which we spotted the various adjoining properties.

Q. Do you know where Johnson & Johnson are located in that territory?

A. Yes, sir. They are quite close to there

Q. Would it affect your opinion—I understand you are giving an opinion here.

A. Yes, sir.

Q. Would it affect your opinion any if I told you that Johnson & Johnson have made a bona fide offer of 40 cents a square foot at the same time the Government entered into its lease of 40 cents a square foot on the whole property?

18 Mr. BEATTY. If your Honor please, I object to any offers. They are immaterial.

Mr. BOYDEN. There is no offer. I am asking if it would change his opinion.

Mr. BEATTY. As evidence of value?

The COURT. I understand all he has asked this witness is if it would change his opinion if certain other figures were offered for this property by somebody else. I think you may answer that question.

The WITNESS. No, sir; it would not.

Mr. BOYDEN. Q. Then you don't consider what people are willing to pay as a fair rental value as having any significance in your opinion?

A. Well, I might.

Q. You might, but you didn't, did you? You arrived at it, as you explained it here, is that correct?

A. Yes, sir; that is the way the computation came out.

Q. And you gave no effect to the fact that the Government itself was willing to pay 40 cents a square foot and had made a lease on that basis?

A. No, sir. As an appraiser I am constantly astonished at what people pay for some things.

Q. And it won't affect your opinion, it would not affect your opinion to learn that Johnson & Johnson in the neighborhood were offering 40 cents a square foot?

A. I don't believe it would.

Q. Would it affect your opinion any if you knew that what General Motors is paying Clearing on the entire building amounts to over 41 cents a square foot over the entire lease?

A. That wouldn't affect my opinion; no, sir.

Q. In the face of all those facts you still will come in and tell the jury you appraised this at 35 cents?

A. Yes, sir.

Q. So that what property in that neighborhood leases for is a matter of no concern to you in arriving at your valuation?

A. Yes; I had access to quite a bit of rental information. Most of the leases out there are made on a net basis——

Q. That is correct.

A. And I got a considerable amount of information and found that, generally speaking, the net leases were running around 23 cents a square foot, and I allowed 12 cents for the operation and, adding them together, made 35 cents, which confirmed the computation on the basis I used, which——

Q. Mr. Cutmore, did you make any inquiry as to General Motors was paying to Clearing in making your appraisal?

A. Yes, sir.

Q. And what did you find that to be?

A. 40 cents. Probably I didn't understand your question.

Q. I think not. I don't think you did. The 40-cent figure is what the Government is paying General Motors.

A. That is right.

Q. I want to know if you had made an inquiry as to what we are paying Clearing. That is a net lease, isn't it, you know that?

A. Yes; I knew it was a net lease.

Q. Yes; and did you make any inquiry as to what that net lease was costing us each year in terms of square feet?

A. I don't believe I remember it, if I did know it then.

Q. This is the building you are appraising, isn't it?

A. Yes, sir.

Q. Now, let us take these two parcels in this building, and I am afraid we are in some danger of confusing the jury here.

Is there a physical division of these two pieces, the 93,000 feet that is being condemned, and the 102,000 feet that we leased to them at 40 cents a foot, is there a physical division in the middle of the building?

A. No, sir.

Q. In other words, the two pieces run right into each other?

A. Yes, sir.

Q. And they are all part of the same floor space of this single building?

A. That is correct.

Q. Do you think then there is any difference between these two pieces, the 102,000 feet which is on the east, as I understand it, and the 93,000 feet, with respect to value? Is one of them more desirable than the other?

A. Well, no; the structure is one integral part, and any division that you make of it is more or less arbitrary. The building is a unit served by one heating plant.

Q. Exactly, but it is true, is not, that there is an inside track in the 93,000 feet, and there is not an inside track in the 102,000?

A. That is true; yes.

Q. It is true, isn't it, that the west tract, the 93,000, has loading docks, which the 102,000 does not have?

A. Yes, sir.

Q. And those figures, I take it, would tend to make the 93,000 square feet slightly more valuable than the other if you were going to make a distinction?

A. If you divide the tenancy, that would be definitely true; yes.

Q. Well, the Government did divide this tenancy and you are aware that they leased the least desirable portion here, the one without the loading dock and the inside track, at 40 cents a square foot, in December 1941? You know that, don't you?

A. Well, it was my understanding that they were to have access to their railroad siding, and the loading dock. There is also a loading dock on the south end of the property served by a railrad siding.

(Thereupon a short recess was taken.)

Mr. BOYDEN. Q. Mr. Cutmore, when did you make this appraisal?

A. In the early part of December of last year.

Q. For the purposes of this lawsuit, I take it?

A. I imagine so; yes, sir.

Q. Has there been any change in the character of this building between December 1941, when the Government leased 102,000 feet at 40 cents, and June of 1942, six months later, when they condemned the property, the 93,000 feet?

A. Do you mean any structural change?

Q. Any change in the character of the building?

A. No, sir.

Q. Well, any change at all. I don't want to limit you to that.

A. Well, there may have been some partitions rearranged. There was no essential change in the type of the structure.

Q. The building had not become less valuable in any way, had it?

A. No, sir.

Q. You say you made an appraisal, but you didn't go into what it cost General Motors to maintain their lease with Clearing?

A. No, sir; I made a valuation of the entire property and from that valuation deduced a square foot rental value for the entire structure.

Q. Without regard to what the space was leasing for, I understand?

A. That is right.

Q. Would it change your opinion any to know that in 1940 it cost General Motors $80,000 to service this lease, and in 1941, $79,800, and in 1942, $79,900?

A. It wouldn't change my opinion; no, sir.

Q. Mr. Cutmore, you said you arrived at certain valuations on the building and on the land; is that correct?

A. Yes, sir.

Q. You took a percentage of those?

A. Yes, sir.

Q. Then you spoke of various other items you allowed for?

A. Yes, sir.

Q. And that is on this building we are talking about, all of it?

A. Yes, sir.

Q. What did you allow for taxes, in dollars?

A. I think $3,000. I have it here. $3,000.

Q. And what did you allow for insurance?

A. 1,000.

Q. What did you allow for salaries and wages?

A. Well, I didn't break the thing down that way. I computed, for instance, heating cost at so much money.

Q. Well, I don't mean heat. I will come to that. You have no figure for salaries and wages as such?

A. No, sir; in making an appraisal of this type, from our study and case studies of a great many buildings we usually apply a square foot price for this type of building in arriving at an estimate.

Q. Oh, then, what you did was to take a figure by square foot, which would include all these things to service the building?

A. The repairs and maintenance were allowed, $4,500, part of which would be wages, and part of which would be replaced materials.

22 Q. What did you allow by way of amortization and depreciation?

A. Well, I figure the building to be worth $300,000. I allowed four per cent a year, $12,000 depreciation. That is not return on the investment. I allowed eight per cent there, or $24,000.

Q. What was your figure on the land, Mr. Cutmore?

A. $150,000.

Q. Do you think the Government should rent this property from General Motors for less than it cost them to pay Clearing?

Mr. BEATTY. If your Honor please, I object as to what Mister——

The COURT. Objection sustained.

Mr. BOYDEN. Q. Do you think the Government lease of 40 cents made by them in 1941, was too high?

Mr. BEATTY. If your Honor please, I object as to what Mr. Cutmore thinks about any goverment lease.

Mr. BOYDEN. He is an opinion witness.

The COURT. He may answer that question, as a real estate expert.

The WITNESS. Well, I don't know. You see, in a great many cases——

Mr. BOYDEN. Q. I see that.

A. You don't have an opportunity to appraise the negotiations. There might have been something else thrown in.

Q. In your investigation and appraisal in this case for the United States Government, didn't you go into what the Government itself did with respect to the property?

Mr. BEATTY. I object to that, because that lease is wholly immaterial to the issue. It is in the nature of a compromise because the Government has the power to take the property or to enter into a lease, and, for that reason, it is immaterial whether Mr. Cutmore inquired as to what the Government did or did not do.

Mr. BOYDEN. It is perfectly material as showing the background of this witness's knowledge.

The COURT. He may answer that question.

Mr. BOYDEN. Will you read the question?

(The last question was read by the reporter.)

Mr. BEATTY. I object to that.

The WITNESS. Yes, sir.

23 Mr. BOYDEN. Q. You did?

A. Yes, sir.

Q. And in making that investigation did you find that was what we call an arms-length deal?

A. Well, I found out in a very casual way from discussing the matter with various people who knew about it in a general way what had transpired in that negotiation. I wasn't there.

Q. No one told you that there was an element of force or compulsion by either party when the Government made this lease with the General Motors?

Mr. BEATTY. If your Honor please, I object on the ground that it is purely hearsay, as to what somebody may have told him, as to whether there was force or there was not any force.

The COURT. He said he made some private investigation. I think he may answer the question.

The WITNESS. Well, so far as I know, there was no force used on either side.

Mr. BOYDEN. That is all.

(Witness excused.)

Mr. BEATTY. The Government rests, your Honor.

Whereupon the plaintiff rested its case in chief.

The COURT. Do you want to proceed now or do you want to take your recess until two o'clock? Are you ready to go ahead now?

Mr. BOYDEN. I think we might as well recess until two.

The COURT. All right. We will go until two o'clock.

(Thereupon the further trial of the above-entitled case was recessed until 2:00 o'clock p. m. of the same day, Thursday, January 21, 1943.)

24 [Caption.]

THURSDAY, JANUARY 21, 1943,
2:00 o'clock p. m.

Trial resumed pursuant to recess.

Present: Same as before.

Whereupon the defendant General Motors Corporation, to maintain the issues on its behalf, introduced the following evidence:

Mr. BOYDEN. Your Honor, ordinarily I would start out with my General Motors witnesses, but I am going to call Mr. List of Chicago, because he has an engagement at 3:00 o'clock, and I want to let him go. I make that explanation because of his engagement. I did not know about it until noon today, so he put me out of gear a little.

Mr. List.

ERWIN H. LIST, called as a witness herein on behalf of the defendant General Motors Corporation, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. BOYDEN:

Q. Will you please state your name?

A. Erwin H. List.

Q. What is your business?

A. I am an industrial real estate broker.

Q. Practicing in Chicago?

A. Yes, sir.

Q. How long—how many years have you practiced here?

A. Twenty-one years.

Q. I suppose you have held the usual offices in real estate associations, and so on?

A. Yes.

Mr. BEATTY. I object, if your Honor please.

The WITNESS. I have been vice-president for two terms——

Mr. BEATTY. I object to what he was.

Mr. BOYDEN. I will strike the question.

The COURT. All right.

Mr. BOYDEN. Q. What offices have you held in the Chicago Real Estate groups?

A. I have been vice president of the Industrial Division for two terms, and I am now on my third two-year elected term as a member of the Industrial Appraisal Division of the Chicago Real Estate Board.

Q. Are you familiar with the property in Clearing that was occupied by General Motors and the 102,000 square feet of which they leased to the Government in December 1941?

A. Yes, I am.

Q. By the way, you don't know me? You never saw me before?

A. I never saw you before a half an hour ago.

Q. Were you or were you not asked by the Signal Corps of the United States to make an appraisal of the value; the rental value of that 102,000 square feet?

A. Yes, I was.

Q. Can you give me the approximate date that you were asked to make that appraisal?

A. Well, I was asked to make the appraisal about March 12, 1942, and I submitted it on March 13th, 1942.

Q. And just so that it is perfectly clear in the record, who asked you to make the appraisal?

A. Lieutenant Vardy, United States Engineer Corps.

Q. Will you tell this jury why he asked you to make the appraisal?

A. I understood that the lease could not be consummated until they had some corroborative evidence or substantiating evidence of the value of the lease which I understand is customary in Government leases.

Q. And am I correct in stating that lease was at 40 cents a square foot?

A. Yes, sir.

Q. Did you report to the Signal Corps, Mr. List, that result of your appraisal and your finding?

A. Yes, I did.

Q. In writing?

A. Yes, sir.

Q. Have you a copy with you——

A. Yes.

Q. Of the report you sent to the Signal Corps?

A. Yes, sir.

Mr. BOYDEN. May this be marked as Defendant's Exhibit 1 for identification?

(Said document was accordingly marked by the Reporter.)

Mr. BOYDEN. Q. And is Defendent's Exhibit 1 for identification a true and correct copy of what you sent the United States Signal Corps?

A. It is an identical carbon copy; yes.

Mr. BOYDEN. I offer it in evidence, your Honor.

Mr. BEATTY. If your Honor please, I object on the ground it is a copy and it is not the original.

The COURT. Unless it is better identified than it has been, the objection is sustained.

Mr BOYDEN. I will withdraw the offer of putting it in evidence.

Q. I will ask you, Mr. List, to tell the jury what you informed the Signal Corps as to the square foot value of the space involved?

Mr. BEATTY. If your Honor please, I object as to what Mr. List informed the Signal Corps. The report, if the original were offered, is the best evidence of what Mr. List may or may not have informed the Signal Corps.

Mr. BOYDEN. He wrote the letter, your Honor. Of course, we could subpoena the Signal Corps, as far as that goes. Have you got an officer around? But he wrote the letter, your Honor. It is clearly admissible.

The COURT. Are you trying to find out what he told them the value was or what he arrived as the value?

Mr. BOYDEN. Both, your Honor. Strike the question and I will go back and have him testify as to what he found.

Q. What did you find in your appraisal, Mr. List, that the square foot value of this space was?

Mr. BEATTY. I object to the form of the question. It purports to call for an opinion and it does not show that he is qualified.

The COURT. Do you dispute the fact that he is qualified?

Mr. BEATTY. Not as an appraiser, but what he found in some other appraisal. He may state in opinion form——

The COURT. Is it your objection that he is not qualified as an expert?

Mr. BEATTY. No, I will admit Mr. List's qualifications.

The COURT. Then what is your objection?

Mr. BOYDEN. You hired him.

The COURT. What is your objection?

27 Mr. BEATTY. I did not hire him.

The COURT. What is your objection?

Mr. BEATTY. The form of the question. He is calling for opinion evidence and he is not getting an opinion, first.

The COURT. Let us take it step by step. Did you have an opinion, Mr. Witness, at that time concerning the value of this leasehold in question?

The WITNESS. I had an opinion after I made my study.

Mr. BOYDEN. Q. Will you state what that opinion is?

Mr. BEATTY. May I ask this question? Is that with respect to the property that the Government leased, or this particular property, Mr. List?

The WITNESS. My report was on the property that the Government leased.

Mr. BEATTY. Objection as to any further questions with respect to the property that the Government leased, on the ground that it is not admissible in this case.

Mr. BOYDEN. The evidence is, your Honor, that this is part of the same building.

The COURT. I understand. He may answer that question.

Mr. BEATTY. Exception.

The WITNESS. I reported that in my opinion the space under the conditions at which it was offered was worth 43 cents a square foot.

Mr. BOYDEN. Q. And is and was that your opinion as to its worth?

A. Definitely.

Q. And did you have any opinion at that time, therefore, as to whether or not a lease at 40 cents a square foot was a fair lease?

A. I did. I thought it would be a very fair lease to the Government.

Q. Now, with respect to your qualifications, Mr. List, have you bought or sold or leased property in Clearing?

A. Yes, sir.

Q. Will you tell the jury a few examples of your experience in Clearing?

A. Well, during the past 15 years I have made not less than 12 and possibly 15, individual deals in Clearing, involving either the leasing of an existing building or the sale of a building or the negotiations which involved the erection of a building on vacant ground, and, in size, they ran all the way from 20,000 square feet to 150,000 square feet each.

28 Q. This opinion that you had, did you convey that the Signal Corps?

A. I wrote them a letter and expressed my opinion; yes.

Q. Substantially as you have testified to it here?

A. In more detail; yes.

Mr. BOYDEN. That is all.

Cross-examination by Mr. BEATTY:

Q. Mr. List, that is your opinion with respect to the other portion of this property, isn't it?

A. In respect to the part which the Government leased at that time; yes.

Q. Not with respect to the part that is under consideration in this case?

A. Well, it would apply equally well, if not more so, in this case, because the piece that was left at that time was the better part of the property, in my opinion.

Q. That includes heating and the ordinary services of looking after a building leased in that community?

A. That is right.

Mr. BEATTY. That is all.

Mr. BOYDEN. That is all.

(Witness excused.)

Mr. BOYDEN. Mr. Thorp.

CHARLES R. THORP, called as a witness herein on behalf of the defendant, General Motors Corporation, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. BOYDEN:

Q. State your name.

A. Charles R. Thorp.

Q. And where do you live, Mr. Thorp?

A. In Detroit.

Q. And what is your occupation?

A. I have charge of the Leasing Department of the General Motors Corporation.

Q. You are what?

A. I have charge of the Leasing Department of General Motors Corporation, real estate leasing.

29 Q. Are you familiar with the building in question in this case?

A. Yes, sir.

Q. The building in Clearing?

A. Yes, sir; thoroughly.

Q. Describe it briefly and generally.

A. Well, it is just slightly under 200,000 square feet, one floor with adequate truck loading facilities and very good railroad facilities, and particularly adaptable for storage because its roof supports have four-inch H-steel beams rather than the large columns, very efficient storage space and the loading facilities are at the floor level.

Q. I show you Defendant's Exhibit 2 for identification, which purports to be a lease between the Clearing Industrial District, Inc., and General Motors, and ask you if you are familiar with that document?

A. Thoroughly familiar with it. I have had to refer to it numerous times.

Mr. BOYDEN. The lease is executed, your Honor, and has the seal of both corporations on it. As I understand the Illinois law, that makes it admissible, so I now ask it be admitted in evidence.

The COURT. Any objection?

Mr. BEATTY. I object to it upon the ground and for the reason that the offer of the lease would indicate the consideration agreed upon at a date which is too remote to have any bearing on the issues involved in this case.

The COURT. How remote is it?

Mr. BEATTY. It is 1928 and it is in the nature of an offer of sale of the same property which is more than seven years past the present date.

The COURT. For what purpose do you offer the lease?

Mr. BOYDEN. Your Honor, this is the lease under which we are still paying——

The COURT. I understand, but is there an agreement to buy, too?

Mr. BOYDEN. No; nothing to do with the purchase at all. This is simply a lease which sets forth our obligation to Clearing. That is the obligation which has been condemned. It is an integral part of this case.

The COURT. There is not any dispute about that, is there?

Mr. BOYDEN. Of course not.

Mr. BEATTY. There is this proposition, that the consideration or the rent fixed in 1928, which is the primary purpose of introducing the lease——

Mr. BOYDEN. I did not state my purpose.

Mr. BEATTY. It is to show the obligation of General Motors under their contract with Clearing Industrial to lease the property in question, which is in the nature of an offer, as evidence of the sale which is more than seven years ago, which this property——

The COURT. I asked him that and he said there wasn't anything in there about sale.

Mr. BOYDEN. I don't know what he is talking about.

Mr. BEATTY. The consideration stated in the lease is definitely in there. As to the rights and liabilities between the Clearing Industrial District and General Motors, they have no bearing upon the question that the jury is called upon to decide, and that is, what is the present rental value or the rental value as of the date this proceeding was started, June 8, 1942, and the lease is dated in May or June 1928, which is more than seven years before the time of this——

Mr. BOYDEN. Perhaps I could clear it up, Judge, by pointing out that the only reason this suit is brought is because we have signed this lease, which is still in existence and does not expire until 1948. Our obligation to Clearing is one of the things this jury will have to consider.

Mr. BEATTY. That is not an issue in this case as between the Government and General Motors and Clearing.

Mr. BOYDEN. That is the lease they are condemning, and now he does not want it in evidence.

The COURT. How else do you have them in here except on that lease?

Mr. BEATTY. They are in here because of that lease——

The COURT. Yes.

Mr. BEATTY. Because they are a tenant, but the consideration stated in the lease is immaterial and incompetent and inadmissible as to the question of how much is the present rental value of this property.

Mr. BOYDEN. Certainly it is a fact for the jury to consider.

Mr. BEATTY. I beg to differ with you.

Mr. BOYDEN. The amount we are paying today as rental on that property is certainly evidence as to—may not be conclusive, but it is certainly good evidence as to the fair rental value, just as the rent they are paying on the other part of it is evi-

dence, or as the rental would be on a building next door. This happens to be the best evidence.

The COURT. Supposing they brought in experts who testified as to rentals of adjacent property as of the time the Government took this property, wouldn't that be competent evidence?

Mr. BEATTY. If the leases negotiated by these men were made within a reasonable time of the date of value in this case, I would say yes, your Honor. This is as though we were condemning the fee to this property and they brought in a sale made in 1928 and offered it as evidence of the value of the property at the present time.

The COURT. You are talking about a sale. You are talking about selling that space by way of lease.

Mr. BEATTY. Yes; they sold that space in 1928 at a stipulated rental. That stipulated rental is so remote to the date of value in this case that it hasn't any bearing and is not legally admissible in this case.

The COURT. I think there is some merit to that part of the objection. This is like if you had a real estate transaction back fourteen years ago. That would not be competent to show the value of this property as of today.

Mr. BOYDEN. This is what they call a net lease and the jury in this case is certainly entitled to consider the amount of rent we pay, not in 1928, but what we paid last year and the year before.

The COURT. Let him state the rent you paid last year.

Mr. BOYDEN. We are going to do that, but I have to put the lease in first.

The COURT. I sustain the objection as far as the introduction of the lease is concerned if it goes back to 1928.

Mr. BOYDEN. We are certainly entitled to put it in, being the document which is being condemned. It has a purpose in this case, hasn't it?

The COURT. It has a purpose, if that is the purpose, but that does not let you put it in for the purpose of showing what the terms of the lease were back in 1928. I think his point is good. You might as well attempt to show a transaction involving real estate in 1928, when you are attempting to show the value of a piece of property you sold last year. I do not think you would be permitted to go back that far.

Mr. BOYDEN. I think there would be force in that, but I say the jury in this case is entitled to consider what we pay, when they condemn this property, and what we are forced to pay Clearing while we are gone.

The COURT. You can testify to that before the jury.

Mr. BOYDEN. I am not offering this for the purpose he is objecting to it. But the orderly procedure is to put the lease in and I understood we would withdraw it as being a bulky document and then put in a summary and then I would have the witness testify to what you are talking about.

The COURT. If you would tell me what you agree to in advance, I would know as much about it as you. Neither the jury nor myself know anything about your agreement with Mr. Beatty.

Mr. BEATTY. I haven't had any agreement with you that you can put this lease in. My memory and recollection is that I specifically told you I could not agree.

The COURT. Testimony as to the present year and last year may go in, but I don't see any point to the whole lease. If you are going to withdraw the lease and put in a summary, you can cover the point.

Mr. BEATTY. I never agreed to the consideration being in here in this case at all. In fact, I talked with Washington about this whole thing and I told Mr. Boyden I couldn't agree with him on any point.

The COURT. That is quite apparent.

Mr. Boyden. So that there may be no misapprehension in your Honor's mind, my offer to prove and my order of proof is this: the lease is a net lease. It provides for the payment of so much and the maintenance. All Clearing leases are made that way.

The COURT. Yes.

Mr. BOYDEN. I was going to put the lease in, later to ask Mr. Thorp to characterize it with respect to its main terms, and then have testimony on the years 1940, 1941, and 1942, and certainly——

The COURT. If you will restrict the exhibit to that, all right.

Mr. BOYDEN. I will restrict it.

The COURT. But you are putting the whole lease in.

Mr. BOYDEN. But you have to start somewhere, Judge. The lease is an admissible document. It is the document under which we occupy the premises and which has been condemned. The lease does not mean anything without testimony on it.

33 The COURT. I understand.

Mr. BOYDEN. Because it is a net lease. There is nothing prejudicial to the Government in the terms of the lease. It is a net lease.

The COURT. If you are going to put it in the way you suggest you put it in, I don't see much objection.

Mr. BOYDEN. That is exactly the point. In other words, I will ask no question that will go into the field that he has objected to.

The COURT. And later on you will submit a summary and give that to the jury, as I understand it?

Mr. BOYDEN. Yes.

The COURT. Showing the terms of these years that you have just mentioned?

Mr. BOYDEN. That is right; exactly.

Defendant's Exhibit 3 for identification, will you mark this, please?

(Said document was accordingly marked by the Reporter.)

Mr. BOYDEN. Q. Will you look at Defendant's Exhibit 3 for identification and state what that is, if you know?

A. It is a very simple, short summary of the stipulations of the lease, as to rent and obligations.

Q. Was it prepared by you?

A. Yes, sir.

Q. Does it accurately state the facts that it contains?

A. To the best of my knowledge; yes, sir.

Mr. BOYDEN. I will offer that in evidence.

The COURT. What year does that cover?

Mr. BOYDEN. It refers to 1941.

The WITNESS. 1940, 1941, and 1942.

Mr. BOYDEN. 1940, 1941, and 1942. Your Honor has admitted Defendant's Exhibit 2, as I understand it, which is the lease.

The COURT. Yes, sir.

Mr. BEATTY. Is that excluding the consideration that is stipulated in that lease as of 1928?

The COURT. That is introduced on the terms that Mr. Boyden has mentioned, that he would submit a summary of it, showing the terms of the lease for the years, 1940, 1941, 1942, and 1943.

Mr. BOYDEN. Yes. I have got that right here. I am coming to that now, in fact. That is the next exhibit.

Mr. BEATTY. I would like to be clear about it. The con-
34 sideration stated in that lease is the thing that I am objecting to, to the terms of liability, because the consideration that is the rent obligated to be paid by General Motors to Clearing Industrial was made at a time that is too remote to be of any bearing on the question here of what the fair rental value of the property is.

The COURT. That is not mentioned in that summary, is it?

Mr. BEATTY. It is mentioned. Annual rental, so many dollars.

The COURT. For what years?

Mr. BEATTY. For the whole period.

The COURT. I thought you just said 1940, 1941, and 1942.

The WITNESS. It happens——

Mr. BOYDEN. Yes, it is.

Mr. BEATTY. This is limited here to that.

Mr. BOYDEN. It is limited, your Honor. What Mr. Beatty does not understand is that there is nothing in that lease that would be significant of 1928. Without further testimony you cannot read that lease and see what the cost is in 1928. The cost for all these items of maintenance and heating and light is not in evidence.

The COURT. Let us proceed with this lawsuit.

Mr. BEATTY. I object to the introduction of both the lease and the summary, your Honor, and take an exception.

The COURT. All right. They may go in under the terms suggested by Mr. Boyden.

(Which said documents, so offered and received in evidence, were marked "Defendant's Exhibits 2 and 3," respectively, and are in words and figures as follows, to wit:)

Mr. BOYDEN. Q. Mr. Thorp, this lease between Clearing and General Motors is still in effect, is it not?

A. Yes, sir.

Q. Have you, in your capacity as head of the real estate division of General Motors had prepared, in due course of business, and submitted to you the figures and facts with respect to the operation of this building under this lease for the year 1940, 1941, and 1942?

A. I did.

Mr. BOYDEN. Mark this "Defendant's Exhibit 4" for identification.

(Said document was marked accordingly by the reporter.)

35 Mr. BOYDEN. Q. I will show you Defendant's Exhibit 4 for identification and ask you if that summary is the summary which you had prepared.

A. That is the summary; yes, sir.

Q. And it was prepared by the real estate division operated under you, at your request?

A. The accounting department.

Q. Yes; the accounting department.

A. That is correct.

Q. Does that accurately state the figures for those years?

A. Yes, sir; and can be substantiated by our General Motors books.

The COURT. What years are those?

Mr. BOYDEN. 1940, 1941, and 1942. We haven't any data on 1943 yet. We only got the data on 1942 last night. I ask that this be introduced in evidence.

The COURT. Let Mr. Beatty see it first.

Mr. BEATTY. If the Court please, I would like to cross-examine this witness with respect to one or two of these items on here.

The COURT. Very well. You may do so.

Cross-examination by Mr. BEATTY:

Q. Mr. Thorp, the item "salaries and wages," that is the salaries and wages of people who cared for the property; is that correct?

A. That is absolutely correct. I verified that myself.

Q. And the item of "Materials and supplies," are those ordinary, in the course of maintenance?

A. Maintenance of the building.

Q. Of repairing windows, and so forth?

A. Yes, sir. I verified that.

Q. And the rent and house service is that the consideration under the lease from Clearing Industrial to General Motors?

A. The house service, part of it is just a very small item. You will find it is $261.00 for the year 1940. The rent consideration is fifty-four thousand some odd, $54,453, I think, to be exact, and you will find the house service. Just what that is I can't tell you, but it is such a small item.

Q. And that is the consideration that is fixed by this lease back in 1928?

36 A. The house service is fixed only by implication. That is, we pay Clearing a rental of $54,453.

Q. That is the rental fixed by this so-called net rental?

A. For the full twenty years.

Q. And that is the rental that was fixed in 1928?

A. Yes, sir.

Mr. BEATTY. If your Honor please, subject to the objection as to the admissibility of that item of rent paid to Clearing, commonly referred to here as net rental, which was fixed in 1928, I have no objection, but I do have an objection as to the introduction of that as evidence, because it has no bearing in the fair rental at the time of the taking of this property.

The COURT. Supposing they had a lease which was dated in 1940.

Mr. BEATTY. That would be a different story.

The COURT. But the terms of the rent payable in 1940 were fixed under a lease signed in 1928, and therefore, you say that makes it objectionable?

Mr. BEATTY. That is what I say, that it makes it objectionable, because it is identical with a sale of this property, selling the fee in 1928.

The COURT. But that is the only lease under which these people are in court today.

Mr. BEATTY. That is true.

The COURT. That is the only reason you are permitted to bring them in here.

Mr. BEATTY. That is the only reason they are in here.

The COURT. That is the only connection they have with the property.

Mr. BEATTY. That is the only connection they have with the property.

The COURT. As I understand, you call it a net lease, you pay so much per square foot, and over and above that you have to take care of the carrying charges yourself.

Mr. BOYDEN. Yes, maintenance, heat, light, power, taxes, insurance.

The COURT. But the net goes to the landlord.

Mr. BOYDEN. The net is the cash payment to the landlord; yes.

The COURT. Objection overruled. It may go in.

Mr. BEATTY. Exception.

(Which said document, so offered and received in evidence, was marked DEFENDANT'S EXHIBIT 4, and is in words and figures as follows, to-wit:).

37 Mr. BEATTY. Q. This Defendant's Exhibit 4, Mr. Thorp, shows——

The COURT. Except the one item of $200. He does not seem to know much about that, if you are seriously objecting——

Mr. Beatty. I am not objecting to that.

The COURT. Of course, he doesn't know so much about it.

Mr. BEATTY. What I am objecting to is the introduction of the consideration between General Motors and Clearing which was arrived at in 1928. The value of that property may be higher or may be lower in 1942 than the consideration that they obligated themselves to pay for twenty years.

The COURT. But this is the value that they and the landlord fixed upon at the time they signed the lease.

Mr. BEATTY. Yes; and that is in 1928.

The COURT. All right.

Direct examination (resumed) by Mr. BOYDEN:

Q. And this Exhibit 4, Mr. Thorp, shows that for the year 1940 the cost per square foot was 42.7 cents?

A. Yes, that is right, 42.7 cents per square foot.

Mr. BOYDEN. Q. And for the year 1941 it shows 41.9 cents.

A. 41.7; yes.

Q. And in 1942, which is the year that just passed, it shows this lease cost us 43.24 cents per square foot for rental?

A. Yes.

Q. And that is the money that we have paid Clearing, the landlord, for the last three years under the lease signed in 1928?

A. Plus what we paid elsewhere for maintenance and operating expenses.

Q. Well, under that lease itself?

A. Yes, sir.

Q. Mr. Thorp, did you handle the lease that has been referred to as the lease between the defendant and the Signal Corps of the Government, signed in December 1941?

A. Not personally; but it was under my direct supervision.

Q. It was under your direct supervision?

A. Yes, sir.

38 Mr. BOYDEN. Mark this "Defendant's Exhibit 5" for identification.

(Said document was accordingly marked by the reporter.)

Mr. BOYDEN. I ask that Defendant's Exhibit 5 be admitted in evidence, your Honor, being a properly executed document, under seal, signed by the Government and the defendant here, which leases in 1941, six months before this condemnation, the property in the same building as the space here condemned, and I urge, before my learned opponent gets a chance to speak, that when you have a lease of identical property, so identical it is the same building, made within six months of the time of the condemnation, that you are practically right on the nose, and when you add to that the fact that it was made between the same two parties, in which they set a value of the proper rental of the property, this lease is conclusive and there cannot be any question as to its admissibility.

Mr. BEATTY. If your Honor please, I want to object upon the ground and for the reasons that any lease between the Government and a party is in the nature of a compromise, especially where it is taken for the same purpose, and the courts have universally held that such settlements with persons or agencies with a power of eminent domain are not admissible as bearing on the question of value of the property. I should like to be heard on that, if your Honor wants.

Mr. BOYDEN. There is no testimony in the record, your Honor, that there was any compromise involved in this case. In fact, the only Government witness put on the stand testified he did not know of any duress or compromise. The record is that this was an arm-length negotiation, but I can ask this witness, Mr. Thorp, if he knows whether or not there was an element of compromise in this lease.

The WITNESS. Not to my knowledge.

The COURT. Suppose the jury retires a minute. I would like to see this law that Mr. Beatty is talking about.

(Here followed discussion, between Court and counsel, out of the presence and hearing of the jury.)

(Thereupon the following proceedings were had, in the presence and hearing of the jury in open court:)

Mr. BOYDEN. Then I take it Defendant's Exhibit 5, being this lease, is admitted.

39 The COURT. Yes.

Mr. BEATTY. I take it the exception is noted.

The COURT. Yes, sir.

(Which said document, so offered and received in evidence, was marked "Defendant's Exhibit 5" and is in words and figures as follows, to wit:)

Mr. BOYDEN. Will you mark "Defendant's Exhibit 6" for identification?

(Said document was accordingly marked by the reporter.)

The COURT. Do you have a summary of that?

Mr. BOYDEN. Yes, your Honor. I am trying to make this as easy as I can.

The COURT. Show that to Mr. Beatty.

Mr. BOYDEN. Q. I will show you Defendant's Exhibit 6 for identification and ask you what that is.

A. This is a very brief summary of the lease between General Motors and the Government, which you just entered as an exhibit.

Q. Prepared by you?

A. Prepared by me.

Q. From the terms of the lease?

A. Yes.

Q. You are familiar with those terms?

A. Yes, sir.

Mr. BOYDEN. I ask that it be admitted in evidence.

The COURT. It may go in.

(Which said document so offered and received in evidence, was marked "Defendant's Exhibit 6," and is in words and figures as follows, to wit:)

Mr. BOYDEN. Q. Mr. Thorp, without going into this lease in any detail, it is a fact, is it not, that this lease which has just been introduced in evidence calls for a square foot rental of 40 cents?

A. 40 cents; yes, sir.

Q. Will you describe generally and briefly the type of operation carried on in this 93,000 square feet, by General Motors?

A. Well, it was a replacement parts point, and what we call master warehouse for Buick, Oldsmobile, Pontiac, and Chevrolet parts, to replace quickly for the dealers and car owners those essential parts to keep their automobiles running.

Q. Will you describe any special building facilities which helped this type of operation in this property?

40 Mr. BEATTY. If your Honor, please, I object to the question upon the ground and for the reason that it is a description of the business carried on by General Motors at this location, which

does not have any bearing on the question involved in this issue, and it is immaterial, irrelevant, and incompetent.

The COURT. What is the reason for this question?

Mr. BOYDEN. The last question, your Honor, was to describe any building facilities which helped this operation. It goes to the value of the building when it was condemned. It was condemned as a going distributing point or master warehouse, and I will show this building had a special value in that connection, and there cannot be anything irrelevant about it.

The COURT. You may answer the question.

Mr. BEATTY. Exception.

The WITNESS. The building had particular value for the operation, from the fact that it is one-story and had the necessary truck and rail facilities to efficiently handle the products in and out of the building.

Mr. BEATTY. If your Honor please, I move to strike that, as that is definitely a statement of the General Motors business at this particular location. It is immaterial, irrelevant and incompetent and has no bearing on the rental value of this property.

Mr. BOYDEN. Your Honor, it is fundamental that the best use is the use to which we are entitled to it, and all we are doing here is showing that this building had special facilities for doing our type of work and that justifies the rental we are claiming, and, as a matter of fact, the rental we are paying. That is all that is for.

The COURT. What difference does it make what use you are putting the building to them? You are paying for the rental. That is what you are going to attempt to prove here.

Mr. BOYDEN. Yes.

The COURT. You are going to attempt to prove what the value of the space was.

Mr. BOYDEN. We have proved that.

The COURT. Then what difference does it make what you use it for?

Mr. BOYDEN. Because of the operation there, and our operation goes to the question of the damage that was done by the condemnation, by having to move out. I am entitled to show——

41 The COURT. Oh, then I will sustain the objection. The answer will be stricken out.

Mr. BOYDEN. Q. You are familiar with this building and this Government lease that was made under your jurisdiction?

A. Yes, sir.

Q. Have you an opinion as to whether or not the terms of that Government lease, being Defendant's Exhibit 5, fairly represent the fair rental value of the space leased?

A. Why, most certainly, in view of our actual cost being in excess of what we asked the Government. In fact, we figure we are making a very fair lease with the Government.

Q. And is it your opinion and is it still your opinion that it is a fair lease?

A. Definitely.

Q. Have you an opinion as to the fair market value per square foot of that leasehold in June 1942, on an open market without giving any consideration to expenses of moving or damages to the corporation because of the condemnation or any factors except only the fair rental value per square foot, to a customer seeking a lease?

A. Well, I should say somewhere in the neighborhood of 42 cents, which is our actual cost of maintaining, of having and maintaining and operating the building, as shown by the previous evidence submitted.

Q. Did you have any negotiations with respect to space in this building in the month of December 1941 with——

A. Yes, sir.

Q. Any party except the Government?

A. Yes, sir.

Q. With whom did you have those negotiations?

A. Johnson & Johnson.

Q. Who are Johnson & Johnson?

A. Well, there are a nationally known concern who have a building right close to the Buick building there in Clearing, the one that is under consideration here. They have a rather large building of their own. I don't know whether it is rented or owned by them, but it is very close to this building that is under condemnation.

Q. Did they make you an offer?

A. Yes, sir.

Q. Do you know of your own knowledge what they offered to rent that space from you at?

A. Yes, sir; they offered——

42 Mr. BEATTY. I object, upon the ground and for the reason that an offer made by another party is inadmissible an incompetent in this hearing, and I submit Sharp v. The United States, 191 U. S.

The COURT. Sustain the objection.

Mr. BOYDEN. Q. Mr. Thorp, something was said this morning by a witness, Mr. Cutmore, to the effect that this 93,000 square feet and this 102,000 square feet were not divided. Is that a correct statement or not?

A. Not entirely so. There is a cinder block fire wall that separates the two pieces of space.

Q. In other words, they are physically set apart from each other?

A. Yes; an eight inch cinder block wall.

Q. And when was that put in, if you remember?

A. That was put in approximately at the time the parts operation went in there, which I think was in 1933.

Q. You have introduced an exhibit showing what it cost us to operate that lease last year. Are you able to compute what the loss to General Motors would be if there was a finding of a 35 cent square foot value here?

Mr. BEATTY. If your Honor please, I object upon the ground and for the reason that the loss of cost of operation under this lease is immaterial and irrelevant and has no bearing upon the value of this property——

The COURT. If you will make a short objection I will sustain it.

Mr. BEATTY. Objection.

Mr. BOYDEN. That is all, Mr. Thorp.

Cross-examination by Mr. BEATTY (resumed):

Q. Mr. Thorp, you base your opinion of the 42 cents upon computing the cost of operating this property and including the rent fixed under the lease negotiated in 1928, isn't that true?

A. Yes, sir.

Mr. BEATTY. That is all.

Redirect examination by Mr. BOYDEN:

Q. Mr. Thorp, you are taking other factors into consideration, in addition to our cost of that——

A. His question was that I was taking the rent established in 1928, which I must say is true. That lease rental
43 was established when the lease was made. However, that does obtain until the expiration of our lease in 1948; that same rental.

Q. I know, but I am asking you now if you do not take other factors into consideration?

A. Yes, sir; I do. I take all of our cost factors in connection with that building.

Q. And your knowledge of other leases on similar property?

A. I don't know that I just understand the question.

Q. Your knowledge of the Government's lease; you also take that into consideration?

A. Oh, definitely.

Mr. BOYDEN. That is all.

Mr. BEATTY. If your Honor please, I move to strike the testimony of this witness with respect to the opinion of value because it is based on an element that is too remote *of* the date of valuation that is in question here, and by that I mean the valuation of the rental, of the net rental to Clearing District, fixed in 1928, and the rental that is to be fixed is as of June 8, 1942.

The COURT. That is practically the same objection we had before.

Mr. BEATTY. Yes.

The COURT. There will be practically the same ruling.

Mr. BOYDEN. That is all, Mr. Thorp.

Mr. BEATTY. I take it, your Honor, then the objection is overruled?

The COURT. Yes, sir.

Mr. BEATTY. Exception.

Mr. BOYDEN. Mr. Benjamin, who comes from Detroit, asked me if I want to suggest to your Honor that I might want to recall him, in view of subsequent testimony. I understand we always have that right.

The COURT. Yes, sir.

Mr. BOYDEN. In fact, I will now call Mr. List for one question, if I may.

The COURT. All right. I thought he had a three o'clock appointment.

Mr. BOYDEN. That is what he said, but Mr. Hunter grabbed him and asked if I would put him on quickly for one question. Will you take the stand, Mr. List?

44 ERWIN H. LIST resumed the stand and testified further as follows:

Direct examination (resumed) by Mr. BOYDEN:

Q. You are the same Mr. List who just testified here before?

A. Yes, sir.

Q. Have you made a lease of space, similar space, in Clearing within the last thirty days?

A. Yes, sir; I have.

Q. Where was that space located, Mr. List?

A. It was located in the west end of Clearing District, about two miles from this property, further away from Chicago. Do you want me to describe it?

Q. Is the property comparable to this property?

A. Yes. It was a one-story building served by the same railroad and having a trucking facility comparable to this building. It has practically no office space, but in other phases, that is, the

construtcion, the approximate ceiling height and the window construction and thing of that sort——

Q. Would you say it was more or less valuable space than the space in this building?

A. Well, it would depend. To a small company it might be more valuable. To a large company is might be less valuable. It is just a smaller unit of space.

Q. Will you tell this jury what the square foot rental was in that transaction you made in the last thirty days?

A. The rental was 39 cents per square foot, and had to furnish his own heat and all other operating facilities.

Q. When you add heat to the 39 cents, have you an opinion as to what that would result in by way of a square foot figure?

Mr. BEATTY. I object to that. It is a pure computation.

Mr. BOYDEN. It is a question of opinion, of a real estate man.

The COURT. Does he know what the other figures are?

The WITNESS. You asked me only in respect to the heat and there are so many buildings in clearing that they have the heat factor reduced to a fairly constant accurate amount, which is 4 cents per square foot.

45 Mr. BOYDEN. I think that clearly makes his testimony competent.

The COURT. All you have to do is add 4 cents to the other figure, and the jury can do that.

Mr. BOYDEN. Yes.

Q. And that would come to a figure of 43 cents, with heat?

A. With their heat expense; yes.

Mr. BOYDEN. That is all, Mr. List.

Mr. BEATTY. That is all.

(Witness excused.)

Mr. BOYDEN. Mr. Essex.

CHARLES ESSEX, called as a witness herein on behalf of the defendant, General Motors Corporation, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. BOYDEN:

Q. Will you state your name, please?

A. Charles Essex.

Q. Where do you live, Mr. Essex?

A. In Detroit.

Q. And by whom are you employed?

A. General Motors, specifically; Chevrolet.

Q. Describe your position with them, Mr. Essex.

A. I am Manager of the Parts Warehouse operations, nationally, covering 38 warehouses scattered from Los Angeles to Seat-

tle, Portland, Maine to Jacksonville, Florida, serving Buick, Oldsmobile, Pontiac, Chevrolet, dealers with Buick, Oldsmobile, Pontiac, and Chevrolet parts.

Q. How long have you had that position?

A. This particular position since 1937.

Q. And before that you were working in this same division.

A. For ten years.

Q. In your capacity as manager, did you have charge of the Clearing central terminal here we are talking about?

A. That is right, sir.

Q. Will you describe the type of operations carried on in this building?

46 *Colloquy*

Mr. Beatty. If your Honor please, I object as to the type of operations carried on by General Motors in conducting their business from this point.

The Court. What is the reason for this line of questions?

Mr. Boyden. Now, I think we have come to this question at last. The only way that I can bring in damage to the jury is to explain to them what we did out there, what we had out there, and then show them what we were forced to do with it and why we had to spend the money. Now we come to the question of damage to our property.

The Court. Then we might as well let the jury retire and we will argue that question out now.

Mr. Boyden. I think so.

The Court. We are right on head into it.

Mr. Boyden. Yes; we are right there now.

The Court. All right. Let us take the jury out to their room.

Mr. Boyden. I am all through with valuation.

(The following proceedings were had out of the presence and hearing of the jury:)

The Court. Is this a question of damage?

Mr. Boyden. A question of expense of moving, damage to the property, but limited only, your Honor, to those items of dollars spent. We are not asking and could not under the cases, I am sure——

The Court. The damage in connection with your having to move?

Mr. Boyden. We are not asking for any profit, because our business was interrupted; nothing speculative.

The Court. I understand.

Mr. Boyden. Just dollars spent.

The Court. The case you are talking about is Miller, the one that just came down?

Mr. BEATTY. Yes, your Honor.

The COURT. January 4th?

Mr. BEATTY. Have you got a copy of the decision?

The COURT. Yes, sir.

Mr. BOYDEN. This is my witness. Whom do you wish to open?

The COURT. Well, you are offering the proof. It has to do with the expense connected with your moving. All right.

Mr. BOYDEN. An expense connected with the moving, and, in addition, damage. What we are offering to prove, as tabulated in schedules, is this:

47 You need not take this for us, unless somebody wants it; unless your Honor feels there is value to it.

(Thereupon counsel for both sides argued, off the record.)

The COURT. This produces a very peculiar situation, and evidently it is hard law, but I do not know what I can do except to follow the law. In this very latest case of the United States against Miller, decided by the Supreme Court January 4th of this year, they very distinctly say that questions of substantive rights, such as the measure of compensation, are grounded upon the Constitution of the United States, so that pretty nearly eliminates these Illinois cases.

Mr. BOYDEN. It does not, however, your Honor, state what the substantive law is, nor does the whole opinion attempt to say it. We are just as much in the dark as we ever were.

The COURT. It says it is grounded on the Constitution of the United States. That is where your theory of compensation comes from.

Mr. BOYDEN. Yes; just compensation.

The COURT. Just compensation; they shan't take your property without giving you just compensation.

Mr. BOYDEN. And "just compensation" has been judicially described as making a man whole.

The COURT. I think this decision means they are going to take the decisions of the United States Courts rather than the courts of the different States.

Mr. BOYDEN. Well, in the District Court in Pennsylvania there is a decision which gives these special damages. That was the case of——

The COURT. That is in Pennsylvania. Under what law?

Mr. BOYDEN. Federal law, Judge. What I read you is 275 Fed.

The COURT. The only thing novel about your case, as you have stated it, and as I understand it, is that you have to move twice. If you only had to move once, you admit the law is as the Government contends it is.

Mr. BOYDEN. No. I cannot admit that is good law.

The COURT. Let's see here. Here is this case of 284 Federal.

Mr. BOYDEN. What is the name of that case, Judge?

The COURT. Gershon vs. United States.

Mr. BOYDEN. Oh, yes. That case seems to hold there is
48 no question about it where you have to move once, the lease was extinguished.

The COURT. They go further than that. They say the law charged the plaintiff with notice that it was subject to be deprived of the use of these premises by the exercise of the power of eminent domain, the inconvenience and expense incident to vacating the premises upon the expiration of the right at any time not being proper subjects in determining the just compensation to be paid by the party acquiring it.

Mr. BOYDEN. Yes. Obviously, the reason for that is because they would have that same expense and inconvenience later.

The COURT. They don't say that. They say the Government has a superior right.

Mr. BOYDEN. We are not contesting the Government's right.

The COURT. They are entitled to come in and exercise that right, and the inconvenience and expense on the part of the tenants in vacating are not recoverable.

Then there is this other case of Potomac Electric Power against United States.

In view of that law, I am forced to sustain the objection of the Government, so far as that line of testimony is concerned.

(Thereupon a short recess was taken.)

(The following proceedings were had in open court, in the presence and hearing of the jury:)

Mr. BOYDEN. Judge, I take it, under your ruling, the next order of business would be an offer of proof, to make our record.

The COURT. Yes.

Mr. BOYDEN. And that will take some little time. Of course, that won't be in the presence of the jury.

The COURT. Have you some other evidence we can finish up with the jury by 4:30, and then you can read the offer in?

Mr. BOYDEN. We have no other evidence, your Honor, on valuation.

The COURT. That would conclude your case, then?

Mr. BOYDEN. That would conclude the case. That is all the valuation. The offer of proof goes to the cost of removal and the damage to property.

The COURT. The jury may as well be excused until
49 tomorrow morning, and then you can read your offer of proof into the record.

Mr. BOYDEN. That is right.

The COURT. The jury may go until ten o'clock tomorrow morning.

(The following proceedings were had out of the presence and hearing of the jury:)

Defendant's offer of proof

Mr. BOYDEN. Defendant offers to prove by Mr. Charles Essex that defendant had at the premises in Clearing installed equipment in the amount of approximately $101,000, consisting of bins and other facilities for a central distributing point; that it had at said location an inventory of parts and machinery of approximately $250,000; that the premises were condemned about June 8, 1942; that about June 16th, Captain Gilpatrick of the Signal Corps told Mr. Essex that he had to get out in three or four days or he would move him out with soldiers; that thereafter Mr. Essex closed the operation of the plant and for the next five weeks relocated his property, demolished the bins and other personal property in the warehouse, hired men to complete the moving and bought all necessary supplies and paid all necessary freight bills to complete the operation of putting the building in shape for the government and in relocating the inventory as well as that part of the equipment which was not destroyed, in other plants and locations throughout the country.

Does your Honor believe there is merit in numbering your offers of proof?

The COURT. In numbering them?

Mr. BOYDEN. Yes. I don't suppose there really is, except for identification.

The COURT. Just for identification. I don't know what advantage there is to it.

Mr. BOYDEN. Defendant further offers to prove by Mr. Essex and by Mr. John Kearns, of the Accounting Department in Detroit, that the defendant, in the due course of business, segregated all items of expense and damage attributable solely to the operation of moving as the result of the condemnation, and that all these records were kept separate and apart from the other company expenses and gathered together in the defendant's main office in Detroit.

Defendant further offers to prove by these same witnesses and by the original records of defendant, the following:

50

1. That between the period of January 22, 1942, and July 31, 1942, the defendant paid the sum of $2,338.85 in salaries to employees engaged solely and exclusively upon the business of completing the job of moving and in demolishing the building so that the mov-

ing could be accomplished; that these men were engaged in the clerical work to keep track of the operations; that these men were not engaged in any other work for the company;

2. That the defendant was forced to pay out the sum of $3,472.33 to employees by way of separation and vacation allowance payments; that these were payments to which employees were automatically entitled by virtue of the company's policy when they left the company's employ through no fault of their own; that none of these men have since been rehired by defendant and that said payment represents a complete loss to defendant; that said men would not have been discharged if the said premises at Clearing had not been condemned;

3. That the defendant expended the sum of $1,360.44 for salaries to seven central office employees; that it was necessary to transfer to Clearing in Chicago from Detroit in Michigan, these employees in order to dispose of the equipment and inventory; that none of these men did any regular routine work for the company during the period for which they were paid the above sum of money; that these men were necessary to complete the work of moving and demolition as insisted upon by the Signal Corps;

4. That the defendant expended the sum of $14,011.27 for wages paid to labor at Clearing, beginning with the week ending June 27th through August 15th; that this sum represents the pay roll of the labor at Clearing necessary physically to accomplish the work of moving and demolition and putting the plant in shape to turn over to the Government;

5. That the defendant expended the sum of $829.75 for wages of janitors and watchmen in the Clearing plant for the period from June 20th to August 15th; that this sum was paid for the protection of the Signal Corps and to protect and police the property while it was in the process of demolition and of being moved from the Clearing plant;

51 6. That the defendant expended the sum of $1,566.15 which represented the cost of labor used to unload, check, and put away certain service parts and accessories which had to be shipped from Clearing to Janesville, Wisconsin, because of the condemnation;

7. That the defendant expended the sum of $16.75 representing the cost of labor to unload, check, and put away accessories shipped from Clearing to Minneapolis, Minnesota, as was made necessary by the condemnation;

8. That the defendant expended the sum of $3,728.69 as the cost of labor used to unload, check, and put away service parts and accessories shipped from Clearing to Saginaw, Michigan;

that the shipment of these parts was made necessary by the condemnation;

9. That the defendant expended the sum of $95.76 as the cost of labor used to receive, check, and put away service parts shipped by Clearing to Kansas City, as was made necessary by the condemnation;

10. That the defendant expended the sum of $432.00 as the cost of labor to perform the same operation described in number 9 above for parts shipped from Clearing to Oldsmobile at Lansing, Michigan;

11. That the defendant expended the sum of $1,369.40 as the cost of labor for the operation described in offer number 9 hereof on parts shipped from Clearing to Flint, Michigan, as was made necessary by the condemnation;

12. That the defendant expended the sum of $572.15 for cost of labor to perform the operation above described in offer number 9 for parts shipped from Clearing to Pontiac, Michigan, as was made necessary by the condemnation;

13. That the defendant expended the sum of $825.69, which represented state unemployment tax, Federal unemployment tax, and Federal old age benefit tax, upon the salaries and wages paid to men engaged solely in the work of demolition and moving and relocation of the property, all as made necessary by the condemnation. That in addition to said $825.69, defendant expended $293.42, in connection with the lay-off benefit plan of two per cent, which is in force by defendant; that this relates solely to money spent on clearing the premises for the Government, for the Army.

14. That the defendant expended the sum of $1,490.04 by way of expense paid to executives and employees for work done
52 solely in connection with the demolition and moving and relocating at Clearing, made necessary by the condemnation; that this item of expense account is applicable to the men employed by the Detroit office in this connection;

15. That the defendant expended the sum of $280.70 for the purposes described in offer number 14, applicable to employees brought from Janesville, Wisconsin, to Clearing to work solely on the job of moving;

16. That the defendant expended the sum of $830.13 for labor at its Chevrolet plant in unloading fixed assets shipped from Clearing to Dowagias, Michigan, which shipment was made necessary by the condemnation;

17. That the defendant expended the sum of $2,331.17 in purchasing shipping supplies, tools, and services used in packing and shipping the parts and accessories from Clearing, and dis-

mantling and shipping bin equipment and fixed assets—all made necessary by the condemnation;

18. That the defendant expended the sum of $205.63 for the purchase of supplies and services incidental to leaving the building in good condition for occupation by the Signal Corps;

19. That defendant expended the sum of $355.81 in telephone and telegraph charges incidental to arranging shipping destination for clearing the service parts and accessories located at Clearing; that this expense was directly attributable to the condemnation;

20. That the defendant expended the sum of $2,264.77 by way of use of shipping supplies in that amount presently at Clearing warehouse, which supplies were used to ship the parts and equipment aforesaid;

21. (Omitted):

22. That the defendant paid, by way of freight on stationery shipped from Clearing to Detroit the sum of $13.85;

23. That defendant paid the sum of $2,713.57, by way of freight on fixed assets shipped from Clearing to Dowagiac, Michigan, all as made necessary by the condemnation;

24. That defendant paid the sum of $4.10 for freight on stationery shipped from Clearing to Flint, Michigan;

25. That defendant paid the sum of $1,003.03 by way of freight on parts and accessories shipped from Clearing to Janesville, all as made necessary by the condemnation;

53 26. That defendant paid the sum of $1,622.22, by way of freight on parts and accessories shipped from Clearing to Saginaw, Michigan, as made necessary by the condemnation;

27. That defendant paid the sum of $533.99 by way of freight on service parts shipped to Oldsmobile Division from Clearing, as made necessary by the condemnation;

28. That defendant paid the sum of $1,119.76 by way of freight on service parts and accessories shipped from Clearing to the Buick Division, as made necessary by the condemnation;

29. That defendant paid the sum of $687.31, by way of freight on parts shipped from Clearing to Pontiac Division, as made necessary by the condemnation;

30. That defendant paid the sum of $232.69, by way of freight on supplies shipped from Clearing to Janesville, as made necessary by the condemnation;

31. That defendant paid the sum of $1,614.07 by virtue of the condemnation, which amount results from the payment by defendant of the installation costs and service charges in connection with the installment and operation of a burglar system under contract with the Illinois District Telegraph Company; that said

system had to be dismantled and that said sum represents the unamortized installation costs and certain rentals which had to be paid by virtue of the contract which defendant had with the Telegraph Company.

In connection with all the offers of proof from 1 to 31, inclusive, hereinabove made, the defendant offers to prove that it has in court the original documents and vouchers necessary to support said offers.

32. That defendant offers to prove that it has incurred a rental expense of $5,250.00, for rental on premises at Dowagiac, Michigan, for the purpose of storing the fixed assets which had to be removed from Clearing by virtue of the condemnation, which sum represents rental for the period expiring June 30, 1943, which is the same date as the Government condemnation expires;

33. That defendant offers to prove, through expert testimony of company officials, that it has lost a sum of $30,062.90 by virtue of the condemnation, made up as follows:

The sum of $5,062.90, being the value of bin equipment destroyed when the removal was carried out, and

54 The sum of $25,000, being the total of installation, labor, and freight costs on fixed assets lost as a result of dismantling the entire plant at Clearing.

Defendant offers to prove that all of the above expenditures and losses were reasonable expenditures and the direct results of the condemnation, and that none of them are traceable to the performance of any of the defendant's routine business. Defendant further offers to prove that at the time of vacating the property because of the condemnation it was necessary to ship equipment and parts to the places above enumerated because there was no available space in Chicago to store said equipment; that officials of defendant company made an extensive investigation in an attempt to find such a place, but were unable to do so.

We could add to that the first thing in the morning, if we think of anything else.

The COURT. If you have left out anything else. What do you say about this offer?

Mr. BEATTY. I will make an objection to it——

The COURT. That is what we are waiting to hear.

Mr. BEATTY. As to the form——

The COURT. As to the form?

Mr. BEATTY. Yes.

The COURT. What about the substance?

Mr. BEATTY. And as to the substance.

The COURT. You object to the whole offer?

Mr. BEATTY. Yes.

The COURT. On what ground?

Mr. BEATTY. Of course, all of the offer, as far as the substance is concerned, is an offer showing the expense of moving and relocating from the place in Clearing, the property condemned herein, to other places.

The COURT. That is the reason for your objection?

Mr. BEATTY. That is the reason. As to the form, it is not in form under the decisions of Illinois which govern the procedure in this case.

The COURT. All right.

Mr. BEATTY. For Mr. Boyden's benefit, the case of Barthelow v. Davis, 276 Ill. 505, 514, and 515, and Chicago City Railway Company v. Carroll, 206 Ill. 318, 328, should be in question, and the purported answer to the question. That is the effect of those decisions—I am just saving it for the Attorney General to chew on, your Honor.

55 The COURT. Your objection is sustained to the offer as made, and the record will show it. Now, does that conclude the evidence on both sides?

Mr. BOYDEN. Well, I think I would like to keep that open.

The COURT. Well, you may. Do you have any redirect?

Mr. BEATTY. Not that I know of.

The COURT. Will you have your instructions here in the morning?

Mr. BEATTY. Yes.

The COURT. Will you have yours?

Mr. BOYDEN. Yes.

The COURT. All right. I will see you about 10:15 in the morning.

Mr. BENJAMIN. I didn't hear your ruling. Did you sustain his objection to the offer?

The COURT. Yes.

Mr. BENJAMIN. Because of the substance and form; both?

The COURT. Yes, sir.

(Thereupon the further trial of the above-entitled case was adjourned until 10:15 o'clock a. m. of the following day, Friday, January 22, 1943.)

[Caption—48126.]

FRIDAY, JANUARY 22, 1943,
10:00 o'clock A. M.

Trial resumed pursuant to adjournment.

Present: Mr. Beatty, Mr. Boyden, Mr. Benjamin.

Mr. BEATTY. If your Honor please, I wish to withdraw the objection as to the form of the offer of proof and retain only that part as to the form.

The COURT. Your objection yesterday was as to the form and substance of the offer of proof, and now you are withdrawing that objection?

Mr. BEATTY. Not as to the substance, but as to the form.

The COURT. You did not state it that way. You said
56 that you made an objection yesterday as to the form of the offer of proof and that you were withdrawing that objection and retaining only the objection as to the "form". Let us see what your objection is, now.

Mr. Reporter, didn't Mr. Beatty say that he was only objecting as to the form?

(The record was read as above recorded.)

Mr. BEATTY. The objection as to the substance is the same, and the objection as to the form of the offer is withdrawn.

The COURT. Whatever that means, it is all right with me.

Mr. BEATTY. The substance is the thing that is really in dispute here.

The COURT. You are still objecting to the substance?

Mr. BEATTY. Yes, your Honor.

The COURT. That is what I thought you were objecting to yesterday, but you kept talking about form all the time.

Mr. BOYDEN. The record now shows an objection to the form, and objection sustained to the form, and an objection to the substance, and an objection sustained to the substance: In other words, your Honor sustained an objection both as to the substance and form.

The COURT. And you want "form" stricken out, and the objection made and sustained as to the substance?

Mr. BEATTY. That is right.

Mr. BOYDEN. Just so the record is perfectly clear, that there is no objection to form to this offer of proof, that is, of course, very satisfactory.

Mr. BEATTY. That objection is withdrawn.

The COURT. Very well.

Mr. BOYDEN. The record, therefore, will show the only objection which is sustained is as to the substance of the offer of proof.

The COURT. That is right.

Mr. BEATTY. Yes.

The COURT. Is there any further proof to be introduced this morning?

Mr. BOYDEN. I beg your pardon?

The COURT. Are you offering any further proof? You wanted the case held over until this morning.

Mr. BOYDEN. No. That was only because of the sustaining of the objection to the form of the offer of proof. I have no further evidence, your Honor.

The defendant rests.

Thereupon the Defendant Rested Its Case, in Chief.

57 Mr. BEATTY. Mr. Boyden, do you have the exhibit you offered?

Mr. BOYDEN. Yes.

The COURT. Is the Government going to have any further proof to offer?

Mr. BEATTY. Yes, I will.

The COURT. All right.

Mr. BEATTY. Do you still want to offer this in evidence, Mr. Boyden?

Mr. BOYDEN. It was offered and it was refused, though.

Mr. BEATTY. If your Honor please, as to Defendants' Exhibit 1 for identification, offered in evidence as Defendants' Exhibit 1, the objection on the part of the Government is withdrawn.

Mr. BOYDEN. I am not renewing the offer to put it in.

The COURT. What is it?

Mr. BEATTY. It is a report of the United States Division Engineer, by Mr. List, who appraised the property at their request, which was objected to when they offered it yesterday. I am not objecting to it now.

Mr. BOYDEN. I am not offering it now.

The COURT. Why not?

Mr. BOYDEN. I do not need it. He testified he made a finding, and he told the Signal Corps about it, and that is sufficient evidence for our purposes.

The COURT. Then there isn't anything in connection with that exhibit that you care to have put in?

Mr. BOYDEN. No. That is all in in his testimony.

The COURT. All right.

And thereupon, the plaintiff, after the close of the defendants' case in chief, introduced the following evidence, in rebuttal, to wit:

Mr. BEATTY. I will call Mr. Thorp.

The COURT. You call him?

Mr. BEATTY. Mr. Thorp.

58 CHARLES R. THORP, heretofore called as a witness in behalf of the Defendant, General Motors Corporation, in the above-entitled caused, now called as a witness in behalf of the plaintiff, was examined and testified as follows:

Direct examination by Mr. BEATTY:

Q. Mr. Thorp——

The WITNESS. Yes, sir.

The COURT. You were sworn yesterday, were you not, Mr. Thorp?

The WITNESS. Yes, sir.

The COURT. You do not have to be sworn again; just be seated.

Mr. BEATTY. Q. Mr. Thorp, you are the same Mr. Thorp who testified in this case yesterday, are you not?

A. Yes, sir.

Q. You had charge of the negotiations of this lease with the War Department of the United States Government; is that true?

A. Under my supervision, sir.

Q. And——

The COURT. Which lease are you talking about now, Mr. Beatty?

Mr. BEATTY. The lease between the Government and General Motors Corporation, which has been offered in evidence, which was offered in evidence yesterday, if your Honor please.

The COURT. Between the Government and the General Motors Corporation?

Mr. BEATTY. Yes; if your Honor please.

The COURT. As to a part of this building?

Mr. BEATTY. As to a part of this building; yes, sir.

The COURT. All right.

Mr. BOYDEN. The part not here in question.

Mr. BEATTY. That is right.

The COURT. All right.

Mr. BEATTY. Q. And isn't it true that the firm of Nicholson, Porter & List represented the General Motors in the negotiation of that lease?

A. Yes, sir.

Q. Did you pay them a percentage of the commission on the negotiation of that lease, Mr. Thorp?

59 Mr. BOYDEN. Objected to.

The COURT. Objection sustained.

Mr. BEATTY. Your Honor, I would like to argue the point, out of the presence of the jury, if I may.

The COURT. What difference does it make what arrangements they had between them, with the representatives of the Real Estate Department?

Mr. BEATTY. It makes quite a bit of difference.

The COURT. Come over here and let's see what it is all about.

(Thereupon ensued a discussion between Court and Counsel, out of the presence and hearing of the jury and the reporters, after which the following:)

The COURT. You want to get that in the record, do you?

Mr. BEATTY. If your Honor please, I would like to state my objection more fully.

The COURT. Your objection, or your motion, which? You are not making an objection. Mr. Boyden is making the objection.

Mr. BOYDEN. I am making the objection, and it has been sustained, you see.

The COURT. Yes.

Mr. BEATTY. I want to explain my position on the record.

The COURT. Oh, your position. You said your objection.

Mr. BEATTY. May I state that to the reporters, out of the presence of the jury?

The COURT. Yes.

(Thereupon, out of the hearing of the jury, the following proceedings were had, to wit:)

Mr. BEATTY. The witness, Erwin H. List, appeared as a witness for the General Motors. It is believed that the Government has a right to show the interest of the witness in a percentage of commission on the negotiation of the lease offered in evidence as Defendants' Exhibit 5, and to show that the negotiations between the General Motors and Erwin H. List in respect to compensation for the negotiation of said lease was void as against public policy.

Mr. BOYDEN. Objection to that offer.

The COURT. The objection is sustained.

Mr. BEATTY. Exception.

(And thereupon the further proceedings in the above entitled cause were resumed before the Court and jury, as follows, to wit):

60 Mr. BOYDEN. Your Honor, I noticed in the transcript, the reporters do not show my exceptions.

The COURT. It is my understanding that the exceptions are not necessary to be saved in the United States Court.

Mr. BEATTY. I think that matter was raised in a case some time ago, and I pointed out there was some question as to whether we would have to reserve exceptions in these cases, as being an exception from the ordinary rule that exceptions do not have to be saved.

The COURT. All right, if the record does not show your exceptions, the record may not show it, Mr. Beatty.

Mr. BOYDEN. It may show my exception to the ruling of the Court.

The COURT. Yes.

Mr. BEATTY. Q. Mr. Thorp, then it is true that Mr. List represented General Motors Corporation in the negotiation of a lease with respect to the 102,000 square feet of this building that was leased to the Government?

A. Yes, sir.

Q. Isn't that true?

A. Yes, sir.

Q. Mr. Thorp, when did General Motors vacate the 93,673 square feet of floor space?

A. I can only state that it was approximately some time between the 19th of June—the actual date I do not have in mind.

Q. Do you know the date that they turned over the keys to the representative of the War Department?

Mr. Boyden. I object to that, your Honor.

The record in this case, the petition shows the date they condemned this property, which is the legal date at which the condemnation started. The taking date is the legal date on which the condemnation started, you. Honor.

The Court. You are bound by the taking date, aren't you?

Mr. Beatty. That, your Honor, is the question you may have to decide before you submit this matter to the jury.

The Court. That is the date on which you actually start, don't you?

Mr. Beatty. That is the date of the valuation; yes, sir.

Mr. Boyden. The order provides for June 8th, your Honor.

61 Mr. Beatty. But the actual date of the delivery of this property was some time in July, as I recall there.

Mr. Boyden. Well, I object to counsel making those statements in the presence of the jury. There is no evidence in the record as to when that happened. You are bound by the taking date.

The Court. Well, the jury will ignore it as not evidence of any kind. What is the question to Mr. Thorp?

Mr. Beatty. Read it.

(The question was read, as follows:

"Q. Do you know the date that they turned over the keys to the representatives of the War Department?")

The Court. He may answer that question. If you know, Mr. Thorp?

The Witness. A. Well, I would have to check on my records over there. They actually closed operations for a shipment to our dealers and began the complete vacation of the building on the 19th of June, as I understand, and completed it some few weeks later.

Now, in the interim, before we had turned over the entire property to them, however, we permitted them to come in and take some 25,000 feet in the rear of the building that we had vacated prior to the turning over of the 93,000 square feet.

Mr. Boyden. I move to strike out the answer of the witness, if your Honor please.

The Court. Why?

Mr. Boyden. Well, I still think they are bound by the taking

date, and it is immaterial to any issue in this case.

The COURT. Motion denied.

Mr. BOYDEN. Exception.

(To which which ruling of the court, the defendant, General Motors Corporation, then and there duly excepted.)

Mr. BEATTY. Q. Mr. Thorp; will you give us the dates from your records upon which the 25,000 square feet of floor space was delivered to the United States Government?

A. I think Mr. Essex will be able to give you the records; he is the one that gave it to them; the report.

Q. Mr. Essex is here?

A. Mr. Essex is here.

Mr. BEATTY. That is all. Thank you.

The COURT. Mr. Boyden, do you want to ask any questions?

62 Mr. BOYDEN. No questions.

The COURT. That is all. All right.

(Witnes' excused.)

Mr. BEATTY. Call Mr. Essex, please.

CHARLES ESSEX, heretofore called as a witness in behalf of the Defendant, General Motors Corporation, in the above entitled cause, now called as a witness in behalf of the plaintiff in the above entitled cause, was examined and testified as follows:

Direct examination by MR. BEATTY:

The COURT. You have been sworn?

The WITNESS. Yes, sir.

The COURT. You don't have to be sworn again. Be seated.

Mr. BEATTY. Q. Mr. Essex, you are the same gentleman who appeared as a witness on yesterday, are you?

A. Yes, sir.

Q. I take it?

A. Yes, sir.

Q. Will you tell us what date the General Motors Corporation turned over approximately 25,000 square feet of the 93,673 square feet of floor space that is in question in this case to the Government?

A. If you will just give me time to refer to the record.

Mr. BEATTY. All right.

The WITNESS. I have the record here.

Mr. BEATTY. All right.

Mr. BOYDEN. I make the same objection, it is not material, your Honor.

The COURT. The same ruling.

Mr. BOYDEN. Exception.

(To which ruling of the Court, the defendant, General Motors Corporation, then and there duly excepted.)

(The witness examines documents.)

The WITNESS. On July 8th.

Mr. BEATTY. Q. That is the date the 25,000 square feet of floor space of the space involved in this proceeding was turned over to the War Department?

63 A. That is right, sir.

Q. Now, will you tell us when the remainder of the 93,673 square feet of floor space was turned over to the War Department?

Mr. BOYDEN. The same objection.

The COURT. The same ruling.

Mr. BOYDEN. Exception.

(To which ruling of the Court, the defendant, General Motors Corporation, then and there duly excepted.)

The WITNESS. A. On July 23rd.

Mr. BEATTY. Thank you very much, Mr. Essex.

The COURT. July 23rd, what year?

The WITNESS. 1942.

The COURT. 1942?

The WITNESS. Yes.

Mr. BEATTY. That is all.

The COURT. Any cross?

Cross-examination by Mr. BOYDEN:

Q. Do you know what date the War Department condemned this property?

A. June 8th, I believe, sir.

Q. 1942?

A. 1943.

Q. And shortly after did you or did you not have a conversation with a member of the Signal Corps with respect to this condemnation?

A. Approximately eight days later.

Q. That would be what date?

A. About June 16, 1942.

Q. About June 16, 1942?

A. Yes, sir.

Q. Who was that officer?

A. Captain Gilpatrick.

Q. Will you tell the jury what that conversation was.

Mr. BEATTY. If your Honor please, I object upon the ground that it is entirely immaterial. The record speaks here as to what took place.

Mr. BOYDEN. He opened up the question.

The COURT. You cannot have the record stand up in one situation and not stand up in another. Now, you opened it up and
64 I think your opponent has the right to go alongside of you and find out about the situation, too.

Mr. BOYDEN. We would like to find out just what happened, just what was done.

The COURT. The objection is overruled.

Mr. BEATTY. Exception.

(To which ruling of the Court, the plaintiff then and there duly excepted.)

Mr. BOYDEN. Q. Will you tell the jury the substance of your conversation with Captain Gilpatrick?

A. The substance of the conversation was, Capfain Gilpatrick asked how quickly we could get out, and my answer was too indefinite to suit Captain Gilpatrick, so he made the remark that I should understand that we—I forget the exact words that he used—at any rate that the condemnation was as of June 8th, and we were trespassing on his property, and he wanted us out of there inside of four days, and if we didn't get out he would bring in a load of soldiers and move us out in the street.

Q. And thereafter did you close down the business you were doing there?

A. I did.

Q. On what date?

A. On June 19th.

Q. What day was June 19th?

A. On a Friday.

Q. On a Friday?

A. Friday——

Q. And thereafter did you do any business relating to General Motors in that location?

A. None whatsoever.

Q. And your activity from June 19th until the date in July when you turned over finally this property was confined to what; what were you doing during that time?

A. Segregating the parts, of which there were 33,000 different parts stored there, shipping those parts——

Mr. BEATTY. If your Honor please, I object to the detailed answer of the witness.

The COURT. Yes; I shall sustain the objection to that. You have your evidence in. I think that is sufficient.

Mr. BOYDEN. Your Honor, the suggestion he is attempting to make to this jury is that we were not, did not vacate the property, and they did not have the use of it, and inferentially, we were using it for our own purpose.

65 The COURT. He has testified that you were not using it for your own purpose after that date, Mr. Boyden.

Mr. BOYDEN. He has testified that we were not using it, but don't you think I am entitled to show what we were doing, and that we got out just as quickly as we could?

The COURT. I think he has told the jury you got out as quickly as you could. I think you have covered that. He said that you had 33,000 parts which took some time to get them out of the building.

Mr. BOYDEN. Q. Did you hire extra men and make every effort you could to move as speedily as possible?

A. I did.

Mr. BOYDEN. That is all.

Redirect examination by Mr. BEATTY:

Q. Mr. Essex, until June 19th you continued your operations at this place and continued the occupation of the entire 93,673 square feet of flour space condemned in this proceeding?

A. Yes.

Q. Isn't that true?

A. That is correct.

Mr. BEATTY. That is all.

Mr. BOYDEN. Just a minute.

Re-cross-examination by Mr. BOYDEN:

Q. Mr. Essex, do you know of your own knowledge the date that we received this summons; the notice of this taking?

Mr. BEATTY. If your Honor please, I think the record will speak on that more clearly than Mr. Essex's recollection.

Mr. BOYDEN. The record will not show the date we received it.

The COURT. The record will show the date it was served.

Mr. BOYDEN. What?

The COURT. The record will show the date it was served, certainly.

Mr. BOYDEN. Yes.

The COURT. That must be a matter of record. Is there any dispute about that?

66 Mr. BOYDEN. Yes; the petition, which we did not receive until the 16th or the 17th.

The COURT. But when you received it, and when it was served may be two different days.

Mr. BOYDEN. The record shows we were served with the summons on June 15, 1942.

The COURT. Well, that is the record, if that is what it shows.

Mr. BOYDEN. That is all right, then; I will withdraw the question. Thank you, Mr. Essex.

Mr. BEATTY. That is all, Mr. Essex. Thank you.

(Witness excused.)

Mr. BEATTY. The Government rest.

And thereupon the Plaintiff rested his case in rebuttal.

The COURT. Do you rest?

Mr. BOYDEN. That is right.

And thereupon the Defendant, General Motors Corporation, rested its case.

The COURT. The jury may be excused for a few minutes while we discuss some other matters here.

(Thereupon, out of the presence and hearing of the jury, the following proceedings were had, to wit:)

The COURT. Have you exchanged instructions with each other, or not?

Mr. BOYDEN. No, your Honor.

The COURT. Why not?

Mr. BEATTY. I have had a rather unfortunate misanderstanding with my distinguished counsel opposing me here.

The COURT. It is unfortunate, you say?

Mr. BEATTY. Yes.

Mr. BOYDEN. Have you got a copy of our instructions?

Mr. BEATTY. If your Honor please, on behalf of the United States of America, I tender my offered instructions marked Roman numerals "I, II, III, IV, V, VI, and VII."

(Thereupon Government counsel handed up to the Court the following instructions, to wit:)

67 *Plaintiff's tendered instructions*

I

It now becoines the duty of the Court to instruct you, ladies and gentlemen of the jury, upon the law which governs the issue in this case. It is your duty to accept the instructions of the Court as to the law and to be governed by them in your deliberations in the jury room. The Court instructs the jury that the Government has the right to condemn or take private property for a temporary use under its power of eminent domain. That power is subject only to the payment of just compensation which the Constitution requires. The law requires the just compensation to be an amount of money which shall be just to the owner of the property taken and also just to the Government.

II

As has been shown by the evidence the Government has condemned and taken the right to use and occupy the property for the period from July 8, 1942, to June 30, 1943.

III

The just compensation for the use of said premises is the fair rental value of the premises, including of necessity heat and water, for the term just mentioned as though the defendants, Clearing Industrial District and General Motors Corporation, had leased and the Government or any other tenant had rented the premises, and upon the assumption that the defendants were willing to lease and the Government was willing to rent the premises at the fair or market rental value of an annual rent.

Johnson v. United States, 2 C. Cls. 391.
Gershon Bros. Co. v. United States, 284 Fed. 849.
Railway Steel Spring Co. v. C. & E. I. Railway Co., 261 Fed. 690, 694.

IV

Fair or market rental value means that sum of money for which the property could be rented, if offered for rent, in the open market by a reasonably prudent owner, who is ready, willing,
68 and able to lease, to a reasonable prudent person, who is ready, willing, and able to lease and to pay rent in cash or monthly payments, neither of whom are under any compulsion to lease the property.

V

A reasonably prudent person is one who has had an opportunity to become acquainted with the property, its use or uses, and after due consideration of all elements of value or which affect value for rental purposes, can exercise a sound judgment in leasing or renting the property.

VI

The leases admitted in evidence should be considered by the jury in so far as such leases, looking at the circumstances of each lease, may evidence or supply light upon the fair or market rental value of the land condemned herein, but unaffected by the Government's declared intention to acquire the lease of the property for public purposes.

VII

The jury are instructed that they are the judges of the credibility of the witnesses and the weight which shall be given to the testimony of each witness, that such judgment of credibility of the witnesses and the weight to be given their testimony should be tested in the light of accepted human experience, considering the demeanor of the witness, and the nature and extent of his knowl-

edge and understanding of the facts involving the question at issue in this case.

Colloquy.

Mr. BOYDEN. We have an objection to this form of verdict.

The COURT. Let's get down to the instructions, first. Have you seen his instructions?

Mr. BENJAMIN. We have them here right now, reading them.

The COURT. I thought that was what you were doing. You better look at his. You can look at each other's. I thought that is what you were doing there.

Mr. BOYDEN. We tender on behalf of the defendant, General Motors Corporation, instructions 1 to 10, marked
69 with a Roman numeral at the time and with a plain number at the bottom of the instruction.

The COURT. All right. Well, have you read the Government's instructions?

Mr. BOYDEN. Yes, your Honor.

The COURT. Let's go over them now and see what differences you have. What about number 1; instruction number 1?

Mr. BOYDEN. We have no objection to that instruction, your Honor.

The COURT. No. 2?

Mr. BOYDEN. 2; Instruction number 2 of the Government, Defendant objects to. The period is incorrectly stated as July. It should be June 8th.

The COURT. How do you get July 8th?

Mr. BEATTY. If your Honor please, these people did not actually move and turn over any space to the Government until July 8th, according to Mr. Essex's testimony.

Mr. BOYDEN. The testimony was he shut down the plant and went to work moving things out so the Government could get in, and stopped his operations on June 19th.

The COURT. No; he stopped his operations on June 19th; that he received service of summons on June 16th, and on the same or the next day had a talk with Captain Gilpatrick.

Mr. BOYDEN. He said that on the same or the next day he had a talk with Captain Gilpatrick who told him to get out as soon as he could thereafter, and that he did that.

The COURT. June what?

Mr. BOYDEN. June 19th; Friday.

The COURT. Then, that is the proper date, instead of July 8th.

Mr. BOYDEN. June 8th is the date of taking, and that legally is the date they are bound by.

Mr. BEATTY. The date of immediate possession was June 8th, but July 23rd was the date they took possession.

The COURT. I think they should pay for the time after they stopped operations.

Mr. BOYDEN. June 19th.

The COURT. June 19th.

Mr. BOYDEN. Friday, June 19th.

The COURT. Yes.

Mr. BOYDEN. We object to the instruction in its new form, on the ground the correct date is the date of taking, and the order giving them the right to immediate possession is June 8th.

70 The COURT. You object to what?

Mr. BOYDEN. The instruction reading June 19th. We say legally they are bound by the order of June 8th, giving them immediate possession; that that is the correct date.

The COURT. Well, you can't both be in possession and running your business, and the Government being in there at the same time. Your witness said under oath that the functioning of the General Motors branch ceased on June 19th.

Mr. BOYDEN. That is correct, your Honor.

The COURT. That is the date we will leave in there. Now, number 3, what about that?

Mr. BOYDEN. Defendant objects to Government's Instruction number 3, as offered, on the ground that is does not state correctly, define correctly, the compensation to which defendant is entitled.

The COURT. In what respect?

Mr. BOYDEN. It does not include any element of cost of moving, any element of damaged property, any expense in connection with the condemnation, and contains an assumption that defendants were willing to lease to the Government, was willing to rent at a fair rental value, or market value, and the words "market value" and "rental value" have no relevancy in a proceeding of this kind. That is the objection, your Honor.

The COURT. It is the market value of the rental value, isn't it?

Mr. BOYDEN. I don't know what that means in a case of this kind, and that is my objection, your Honor.

The COURT. That is the difficulty we encounter in all these cases, isn't it?

Mr. BOYDEN. That is correct.

The COURT. Just what those words mean.

Mr. BOYDEN. This case I read your Honor, the order pointed out the "fair market value of a lease" means nothing in cases of this kind.

The COURT. They encounter the same situation in all these cases. They encountered the same situation in this Miller case, where the Court said the owner is entitled to the fair market value. The

term "fair" hardly adds anything to it. So, apparently everybody is confused as to what these words mean. It is not at
71 all strange, therefore, that we, out in this city, can be a little confused, in view of what the Supreme Court said last week. Well. And what about number 4? That gets down to the same proposition.

Mr. BOYDEN. Yes; Government's instruction number 4 is objected to for the same reason. If furnishes no basis by which the defendant's damages can be considered.

The COURT. Because it leaves out the elements that I refused to let go to the jury?

Mr. BOYDEN. That is right.

The COURT. How about number 5.

Mr. BOYDEN. Number 5 is objected to as having no relevancy to this case at alk

The COURT. What about number 6?

Mr. BOYDEN. Number 6 is objected to for the reasons above stated, and because it contains the phrase "market rental value of the lease condemned," instead of the "land condemned" and has no relevancy in this case, and is not, in this case, the measure of damages.

The COURT. What do you say about that?

Mr. BEATTY. Well, the land includes the building, your Honor.

The COURT. Could you use the word "lease" there instead of land?

Mr. BOYDEN. It is a leasehold interest they condemned. It would be more accurate to say that. It would not cure my objection, but it would simply be more accurate.

The COURT. The rental value of the leasehold interest condemned here would more accurately describe what was condemned. You see where we are referring to?

Mr. BEATTY. Yes. Rental value of the land condemned herein. We condemned the land for a term of years, your Honor.

The COURT. You are really condemning a leasehold.

Mr. BEATTY. We are really condemning a leasehold there.

The COURT. Wouldn't it more accurately describe it. You say the leasehold interest in the land condemned herein. That refers back to the leasehold interest this company has in it.

Mr. BEATTY. I will consent to a change to "leasehold interest in the land."

The COURT. What about the last instruction? That is just a stock instruction.

72 Mr. BOYDEN. We think that is fine, Judge.

Mr. BEATTY. You think that is fine?

Mr. BOYDEN. Yes.

The COURT. What about Mr. Boyden's instructions here?

Mr. BEATTY. If your Honor please, the instruction number 1 talked about some more general language that the Court's have used. I object to that, because it does not limit the sum or sums of money as will make them whole, and the leasehold interest in the real property taken in this proceeding.

Defendant's tendered instructions

The COURT (Reading). "The Court instructs the jury that just compensation, as that term is used in this case, is the payment to the respondents of such a sum or sums of money as will make them whole, so that upon receipt of the same, they will be neither richer nor poorer by reason of the taking of the leasehold interest in question than they would have been if the same had not been taken."

Mr. BEATTY. The Courts have said that an owner of property, taken for public use, is entitled to be made whole and put in as good a pecuniary position as if his property had not been taken. Again it creates the same situation that Justice Roberts has so ably discussed in United States vs. Miller, in that it does not make a qualification or a limitation as to the making them whole. Making them whole is to give them a fair rental value of the property taken for the time used by the Government.

The COURT. Well, it also means, I imagine, that it makes them neither richer nor poorer as the result of this transaction between the Government and the defendant.

Mr. BEATTY. That is true. But, to make them whole, in view of the position of the authority, would be to pay them all of these incidental expenses, in the thinking of counsel for the General Motors, defendant herein.

The COURT. No; that evidence is not before the jury.

Mr. BEATTY. Of course, that is true, but the making of them whole is limited to the interest taken by the Government in the property involved here for the time that the Government seeks to occupy it.

The COURT. Well, they say here it will make them whole, by the reason of the taking of the leasehold interest taken. They are entitled to have an instruction like that. We can leave out the "richer or poorer." Let's look at number 2.

73 (Instruction number 2, tendered by the defendant, General Motors Corporation, is as follows:

"The Constitution of the United States of America provides that no 'private property (shall) be taken for public use, without just compensation.' The purpose of this proceeding is to ascertain what is the just compensation to be paid by the United States of

America for the taking of the property of the respondent, General Motors Corporation, for public use.")

Mr. BEATTY. If your Honor please, that is essentially the first instruction that I offered.

The COURT. What do you say about that, Mr. Boyden; isn't that practically the same, your number 2, as Government's number 1?

Mr. BOYDEN. I think so, your Honor.

The COURT. Number 3.

(Instruction Number 3, tendered by the defendant, General Motors Corporation, is as follows:

"The Court instructs the jury that it is the function of the Court to determine the competency or incompetency of testimony which is offered; it is the function of the jury to determine the credibility and weight of such testimony.")

Mr. BEATTY. If your Honor please, that instruction number 3 is essentially the same as number 7 of the Government.

The COURT. That is the last instruction; about the credibility of witnesses.

Mr. BEATTY. Yes, your Honor.

The COURT. Is that about fair?

Mr. BOYDEN. Yes; that is covered.

Mr. BEATTY. I have no objection to number 4.

(Instruction number 4, tendered by the Defendant, General Motors Corporation, is as follows:

"The Court instructs the jury that you must not allow yourselves to be influenced in your consideration or decision of any of the issues in this case by the fact that petitioner is the United States Government proposing to acquire the property in question for public purposes, nor by the fact that the amount of your award will be paid out of money raised directly or indirectly by public taxation, nor by the fact that respondent is a corporation. You should decide this case solely upon the evidence under the instructions of the court as to the law.")

74 The COURT. Why is not number 5 a repetition of number 1?

Mr. BOYDEN. We think the words used by the courts are a possible distinction.

Mr. BEATTY. I object to the instruction for the reason that it is a repetition.

The COURT. I think it is a repetition of number 1.

(Instruction number 5 tendered by the Defendant, General Motors Corporation, is as follows:

"The court instructs the jury that in all cases where private property has been taken for public use, as has been done in the present instance, the compensation to which the lessee whose in-

terest has been taken is entitled is the amount of money necessary to put the lessee in the same condition and position as it would have been had its property not been taken.")

The COURT. You can have either 1 or 5, whichever you think is the better one from your standpoint, Mr. Boyden; I think one is a repetition of the other.

Mr. BOYDEN. We prefer number 1 in preference to number 2.

The COURT. Number 6.

(Instruction number 6, tendered by the defendant, General Motors Corporation, is as follows:

"The jury are instructed that the respondent, General Motors Corporation, is entitled to just compensation, which is that sum of money which would reimburse it for the expenses reasonably and necessarily incurred as a result of the taking of its interest in the condemned property; and you are further instructed that, in arriving at that sum, you are entitled to consider the value of the leasehold interest, and the reasonable and necessary expenses incurred in the forced demolition of its property and in moving.").

Mr. BEATTY. We object to that.

The COURT. That covers the expenses. That is out. What about number 7?

(Instruction number 7, tendered by the Defendant, General Motors Corporation, is as follows:

"The Court instructs the jury that in determining the costs of moving respondent's business and the direct damage to respondent's property, both of which are part of the just com-
75 pensation to which General Motors Corporation entitled under the Constitution, you may take into consideration salaries, wages, freight, and other expenses which were reasonably incurred by respondent and which were the direct result of the condemnation you are here considering.")

Mr. BEATTY. Objection to that upon the same grounds, your Honor.

The COURT. The same thing. Number 8.

(Instruction number 8, tendered by the Defendant, General Motors Corporation, is as follows:

"The Court instructs the jury that you may take into consideration in determining the value of the leasehold taken the amount voluntarily paid by the United States Government under the lease it entered into on December 12, 1941, with reference to the 102,167 square feet of floor space."

The COURT. That says the jury can take into consideration the other lease.

Mr. BEATTY. Take it into consideration in view of all the evidence, your Honor. I do not think it need to be pointed out. It is a lease admitted in evidence, the same as the lease of 1928. There

is an objection to that, because it specifically points out an item of evidence for the jury.

The COURT. Well, I personally think that should be brought to their attention. There is a lease that the Government has made with the same parties here, evidently amicably arrived at, and for some reason or another the Government wants to make a lease for some additional space in the same building, apparently the same kind of a space at a reduced figure.

Mr. BEATTY. There are a good many things that can be argued about that lease, and, as I indicated it, I want to reserve all of the exceptions to that element as a factor in determining what is the fair rental for this propery that would be arrived at as of June 1942, between private persons, and not between private persons and the Government, which has power to take the property.

The COURT. Well, I know. After all, but here is the Government, they go out here to the southwestern part of our city, and there is a building, say approximately containing 200,000 square feet of space, and the Government sits down with a repre-
76 sentative of the lessee, and they arrive at a figure of what a little more than half of what that space is worth, and then the Government wants the rest of the building, the same building, the same kind of space, according to the testimony, and the Government says, "No, we won't give you that much, we want to reduce it."

Mr. BEATTY. There was a Congressional investigation of the operations of one agency of the Government in buying and leasing property, your Honor. And this one shows evidence of not being so much different than that.

The COURT. Well, after all, here is the General Mofors Corporation, and I don't think anybody would accuse them of collusion.

Mr. BEATTY. I am not accusing them of collusion.

The COURT. They made a lease years ago for a certain space and the price the Government is paying for that space is not above what they are paying under the lease.

Mr. BOYDEN. No. And as far as casting any aspersions——

Mr. BEATTY. I am not casting any aspersions on anybody connected with the General Motors Corporation.

The COURT. Let's talk about instruction number 8, then. That is where you make that objection that you last pointed out?

Mr. BEATTY. Yes, your Honor.

The COURT. We can add in there "When taken into consideration in connection with all the evidence in the case," not really pointing that out in particular.

Mr. BEATTY. That is as to 9 or 8?

The COURT. As to 8.

Mr. BEATTY. If your Honor please, I will raise the question that the mention of the particular lease, where there are several leases mentioned in the evidence, is pointing out to the jury a particular lease, a particular bit of evidence, and for that reason I believe that the instruction, if given, is objectionable.

The COURT. All right. How about number 9?

(Instruction number 9, tendered by the Defendant, General Motors Corporation, is as follows:

"Neither by these instructions, nor by any words uttered, nor remarks made by the court during this trial does or did the court intimate or mean to express an opinion as to the weight or
77 credit to be given to any of the various witnesses who have testified, or as to what the facts are or what the facts are not in this case. It is solely and exclusively for the jury to determine the weight and credit to be given the testimony of the various witnesses who have testified, and to find and determine the facts, applying to their deliberations and to the facts as found by them the law as stated in these instructions.")

Mr. BEATTY. If your Honor please, instruction number 9 is objected to because it is essentially the same as instruction number 7 as offered by the Government.

Mr. BOYDEN. That is all right, your Honor. We do not insist on that.

The COURT. Have you got an instruction like that?

Mr. BEATTY. I object to that, because that injects into the evidence and to the instruction an element that is not an element of just compensation, which is the cause of carrying on this dispute with the Government, as to what is a fair rental value of the property that is taken.

The COURT. That is number 9?

Mr. BEATTY. Yes.

The COURT. I think we have ruled that out in the evidence. There is no use putting it in the instructions, as we go along.

Mr. BENJAMIN. May I ask Mr. Beatty one question which may call for an objection on instruction number 2?

The COURT. Yes.

Mr. BENJAMIN. Isn't it true, Mr. Beatty, the law is to the effect, in figuring damages in compensation cases or arriving at a market value, you arrive at it as of the date of the taking of the property, the entry of the order of taking?

Mr. BEATTY. That is true, with a certain modification. The question is what is the date of taking? Is it the date the Court entered the order that we are entitled to immediate possession, or is it the date we get the possession?

Mr. BENJAMIN. Well, I am asking you, as a matter of law; isn't that the standard?

Mr. BEATTY. As a matter of law, I don't think the point is clear. It is a matter of fact and law which the Court has to pass upon at the time a question of this kind is presented.

The COURT. I don't think the mere fact the Government
78 filed a declaration of taking down here obligates it from that time on. I think the actual taking should be figured.

Mr. BENJAMIN. I grant you, on a declaration of taking, that is true. But the Government did not pursue that policy here. They had an order of immediate possession entered on June 8th, and as of that date, and from that time on, we had no rights in the property as far as the leasehold interest was concerned. Is that right?

The COURT. Well, they say in that declaration, they had a right to take immediate possession.

Mr. BENJAMIN. I think Mr. Beatty will agree with me.

Mr. BEATTY. I drew and presented it to your Honor.

Mr. BENJAMIN. And didn't you inform me, when I raised the question as to what date the papers would date from, you said June 8th?

Mr. BEATTY. I considered that date generally speaking as the date of taking. But here is the date of actual possession.

The COURT. This order merely provides they have a right to take immediate possession. Now, when they did actually take possession is another matter.

Mr. BEATTY. That is true, your Honor.

(Instruction number 10, tendered by the defendant, General Motors Corporation, is as follows:

"The Jury are instructed that, in arriving at the just compensation to be awarded to the defendant herein, you are to consider what it has lost as a result of this action on the part of the Government and you are not to base your considerations and deliberations upon what the Government has gained thereby.")

Mr. BOYDEN. May I see the form of verdict? Our objection to this verdict was the objection we made before that the words "just compensation" should include the expenses of moving and damages to the property, set out before in that regard. Except for that objection, we have no objection to the form of verdict.

Mr. BEATTY. If your Honor please, as to this form of verdict—— verdict——

The COURT. Well, that is saved by your objection.

Mr. BOYDEN. Yes.

Mr. BEATTY. That is right.

Mr. BOYDEN. That is right.

Mr. BEATTY. If your Honor has indicated June 19, 1942,
79 as the date of the beginning of the term, may I suggest that instead of "from a year ending June 30, 1943" that the verdict be for the term "from June 19, 1942, to June 30, 1943"?

The COURT. "For the term"?

Mr. BEATTY. From "June 19, 1942, to June 30, 1943." Do you want to put in "inclusive" after 1943?

Mr. BENJAMIN. No. One day more won't make much difference.

The COURT. From "June 19, 1942, to June 30, 1943."

Mr. BEATTY. Yes.

The COURT. Is that right?

Mr. BEATTY. Yes, your Honor.

The COURT. We will strike out that "term of years," then.

Mr. BEATTY. Yes, cut out the words "of years ending."

The COURT. Strike out "of years ending" and insert "the term, for the term from June 19, 1942, to June 30, 1943."

Mrs. BEATTY. Yes.

The COURT. So that you gentlemen will understand what instructions I am going to give to the jury, I am going to give the instructions 1 to 7, handed up by the Government, and I am going to give instructions, 1, 4, and 8 submitted by the defendant.

Under these rules, after the instructions have been read, and before the jury retires, counsel must be given an opportunity to state what exceptions he has to these instructions given.

The way that works out usually, is that the objections which you have just made, as you have been going over these instructions, may be considered the exceptions you will make at the conclusion of the reading of the instructions.

Mr. BOYDEN. That will be very satisfactory.

Mr. BEATTY. That is satisfactory, if your Honor please.

Mr. BOYDEN. And may we also note an exception to the refusal to give out instructions?

The COURT. Yes, sir; you are saying an exception to my denying you the right to have the instructions given that I have indicated I have refused.

Mr. BOYDEN. That is correct.

The COURT. All right. Bring in the jury.

(Thereupon, in the presence and hearing of the jury, the following proceedings were had, to wit:)

80 *Court's instructions to jury*

(Thereupon the Court instructed the jury, as follows:)

The COURT. At this time, ladies and gentlemen of the jury, it becomes the duty of the Court to give you the instructions upon

the law which will govern your deliberations in connection with arriving at a verdict in this case.

The first thing I want to tell you is this: That when you go into that jury room you do not have to leave outside your common sense, those experiences which have been yours throughout your lives and those things which cause you to pass upon the important affairs of your individual lives, those things which make up for each one of you the common sense which you possess. You take that into the jury room with you, you don't have to leave that outside, and that can stay with you while you are deliberating until your have finally reached a verdict in this case.

You do not have to leave the role of your ordinary being when you go in there as a juror.

Now, it is the duty of the Court to instruct you upon the law which governs the issues in this case and it is your duty to accept these instructions as to the law and to be governed by them in your deliberations in the jury room. The Court instructs the jury, as a matter of law, that the Government has the right to condemn or take private property for a temporary use under its power of eminent domain. That is the right given to the Government by the Constitution. The power is subject only to the payment of just compensation which the Constitution requires. The law requires the just compensation to be an amount of money which shall be just to the owner of the property taken and also just to the Government.

As has been shown by the evidence in this case, the Government has condemned and taken the right to use and occupy the property in question for the period from June 19, 1942, to June 30, 1943.

The just compensation for the use of premises is the fair rental value of the premises, including of necessity heat and water, for the term just mentioned as though the defendants, Clearing Industrial District, the General Motors Corporation, had leased and the Government or any other tenant had rented the premises and upon the assumption that the defendants were willing to lease and the Government was willing to rent the premises at the fair or market rental value of an anual rent:

You are also instructed that just compensation, as that
81 term is used in this case, is the payment to the respondents, that is, the General Motors, of such a sum or sums of money as will make them whole, so that upon receipt of the same, they will be neither richer nor poorer by reason of the taking of the leasehold interest in question than they would have been if the same had not been taken.

Fair or market rental value means that sum of money for which the property could be rented, if offered for rent, in the open mar-

ket by a reasonably prudent owner, who is ready, willing and able to lease, to a reasonably prudent person who is ready, willing and able to lease and to pay rent in cash or monthly payments, neither of whom are under any compulsion to lease the property.

A reasonably prudent person, as herein defined, is one who has had an opportunity to become acquainted with the property, its use or uses, and after due consideration of all elements of value or which affect value for rental purposes, can exercise a sound judgment in leasing or renting the property.

The leases admitted in evidence should be considered by the jury in so far as such leases, looking at the circumstances of each lease, may evidence or supply light upon the fair or market rental value of the leasehold interests in the land condemned herein, but unaffected by the Government's declared intention to acquire the lease of the property for public purposes.

In connection with all the other evidence presented in this case, you are instructed that you may take into consideration in determining the value of the leasehold interest taken the amount voluntarily paid by the United States Government under the lease it entered into on December 12, 1941, with reference to the 102,167 square feet of floor space.

You are also instructed that you, as jurors, are the sole judges of the credibility of the witnesses and the weight which shall be given to the testimony of each witness, that such judgment of credibility of witnesses and the weight to be given their testimony shall be tested in the light of accepted human experience, considering the demeanor of the witness or witnesses, and the nature and extent of his knowledge and under standing of the facts involving the questions at issue in this case.

You are also instructed you must not allow yourselves to
82 be influenced in your consideration or decision of any of the issues in this case by the fact that the petitioner is the United States Government proposing to acquire the property in question for public purposes, nor by the fact that the amount of your award will be paid out of money raised directly or indirectly by public taxation, nor by the fact that respondent is a corporation. You should decide this case solely upon the evidence and under the instructions as they have been given to you concerning the law governing you in this case.

Now, there is a form of verdict which will be submitted to you, and the first thing you should do upon arriving in your jury room is to select some one of your members as your foreman. Thereafter you will deliberate on your verdict, and if and when you have reached the verdict, this is the form which has been submitted to you:

"We, the jury, impaneled and sworn in the above entitled cause, do find and report that the just compensation, which the petitioner shall make for the taking of the property described in the petition for condemnation for the term from June 19, 1942, to June 30, 1943, is the sum of $_____."

In that space you will fill in whatever sum you award the petitioner in this case, or the General Motors, in this case, referred to as the petitioner.

That form of verdict should be signed by the person selected by yourselves as your foreman and by each of the other eleven jurors.

You will take with you to the jury room this form of verdict, together with the exhibits which have been admitted in evidence.

I take it the record may show, before the jury retires, and after the instructions were read, you then made the objections and you took the exceptions which you had made and which were taken while we were discussing the instructions before the jury came in.

Mr. BEATTY. That is right, your Honor.

Mr. BOYDEN. That is right, your Honor.

(There upon, after the Marshals were duly sworn to take charge of the jury, the jury retired to deliberate on its verdict.)

83 *Government Exhibit One*

UNITED STATES OF AMERICA,
DEPARTMENT OF JUSTICE,
June 1, 1942.

Pursuant to Title 28, Section 661, U. S. Code * * * 882, Revised Statutes), I hereby certify that the * * * paper is a true copy of the original record * * * Department, of a letter from the Honorable Henry L. Stimson, * * * of War, to the Attorney General, dated May 29, 1942, requesting the * * * by condemnation of a term for years ending June 30, 1943, of 93673 * * * of floor space, of more or less, in Cook County, Illinois, for use in * * * with the establishment of a signal corps depot in the General Motors * * * Chicago, Illinois.

In witness whereof, I have hereunto set my hand, and caused the seal of the Department of Justice to be affixed, on the day and year first above written.

[SEAL]

NORMAN M. LITTLE,
Assistant Attorney General.

NOTE.—Asterisks indicate illegible portions of photostatic copy of exhibit.

(Stamp) May 29, 1942.

The Honorable, The Attorney General, *Washington, D. C.*

DEAR MR. ATTORNEY GENERAL: It is necessary and advantageous to the interest of the United States that certain interests in lands located in Cook County, State of Illinois, be acquired by the United States of America for use in connection with the establishment of a signal corps depot in the General Motors Building, Chicago, Illinois.

Therefore, pursuant to the provisions contained in the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518; 50 U. S. C. sec. 171), and March
84 27, 1942 (Public Law 507—77th Congress), which Acts authorize the acquisition of land for military or other war purposes, and the Act of Congress approved April 28, 1942 (Public Law 528—77th Congress), which Act appropriated funds for such purposes, it is requested that you cause the necessary proceedings to be instituted for the condemnation of a term for years ending June 30, 1943. The interests in land to be acquired comprise 93,673 square feet of floor space, more or less, situate in Cook County, Illinois, and are more particularly described in the inclosed Exhibit "A" and on the inclosed map entitled Exhibit "D." The names of the purported owners of said interests in land are set forth in the inclosed Exhibit "A."

The Act of Congress approved April 28, 1942, supra, appropriated funds for this acquisition.

The aforementioned interests in land are to be utilized to provide for additional storage space and the utmost haste in expediting this project is vital to the successful prosecution of the war. It is requested that pursuant to the provisions of the Act of Congress approved March 27, 1942 (Public Law 507—77th Congress), you procure an order granting immediate possession of the aforesaid lands.

Appraisals are being obtained under the supervision of Lt. Col. F. I. Kennedy, Division Real Estate Director, Great Lakes Division, McCormick Building, 332 South Michigan Avenue, Chicago, Illinois, and the probable date of availability of the appraisal reports can be obtained by your field representative from the Division Real Estate Director. No arrangements have been made by this Department for the procurement of title evidence.

Inclosed herewith are two additional copies of Exhibit "A" and five additional copies of Exhibit "B."

Sincerely yours,

HENRY L. STIMSON,
Secretary of War.

2 Inclosures:
1—Exhibit "A" (in trip.)
2—Exhibit "B" (in sext.)

85 *Exhibit "A"*

Description.—Premises known and described as 5001 West 65th Street and 6510–40 South Lavergne Avenue, comprising approximately 93,673 square feet of floor space, being the Westerly portion of the one story building located at the Southwest corner of 65th Street and Lavergne Avenue, Chicago, Illinois, and being that portion of said one story building not presently under lease to the United States.

Names of Purported Owners.—Clearing Industrial District, Inc., General Motors Corporation, Argonaut Realty Division.

89 *Defendant's Exhibit 1*

MARCH 13, 1942.

UNITED STATES DIVISION ENGINEER,
Great Lakes Division,
Federal Reserve Bank Building, Cleveland, Ohio.

DEAR SIR: Returning the attached endorsement left with the writer yesterday by Lieut. J. Witkowsky, Jr., concerning the property leased by the Signal Corps, U. S. A., at 6510–40 So. Lavergne Avenue, Chicago, from General Motors Corporation, lease effective January 1, 1942.

The area leased is 102,167 square feet, or approximately one-half of the entire building at the above address, located in the Clearing Industrial District, which building is under lease to the General Motors Corporation by the Clearing Industrial District, said lease having originally been made in 1928 and expiring sometime in the year 1944.

In submitting a valuation of this property and substantiating the present rental to the Signal Corps, the writer wishes to state that he is particularly familiar with properties and conditions in the Clearing Industrial District, and has personally negotiated long-term leases or sales on 14 plants in this particular area in the course of the last 15 years.

In his opinion, the entire property would have a fair value in this market as follows:

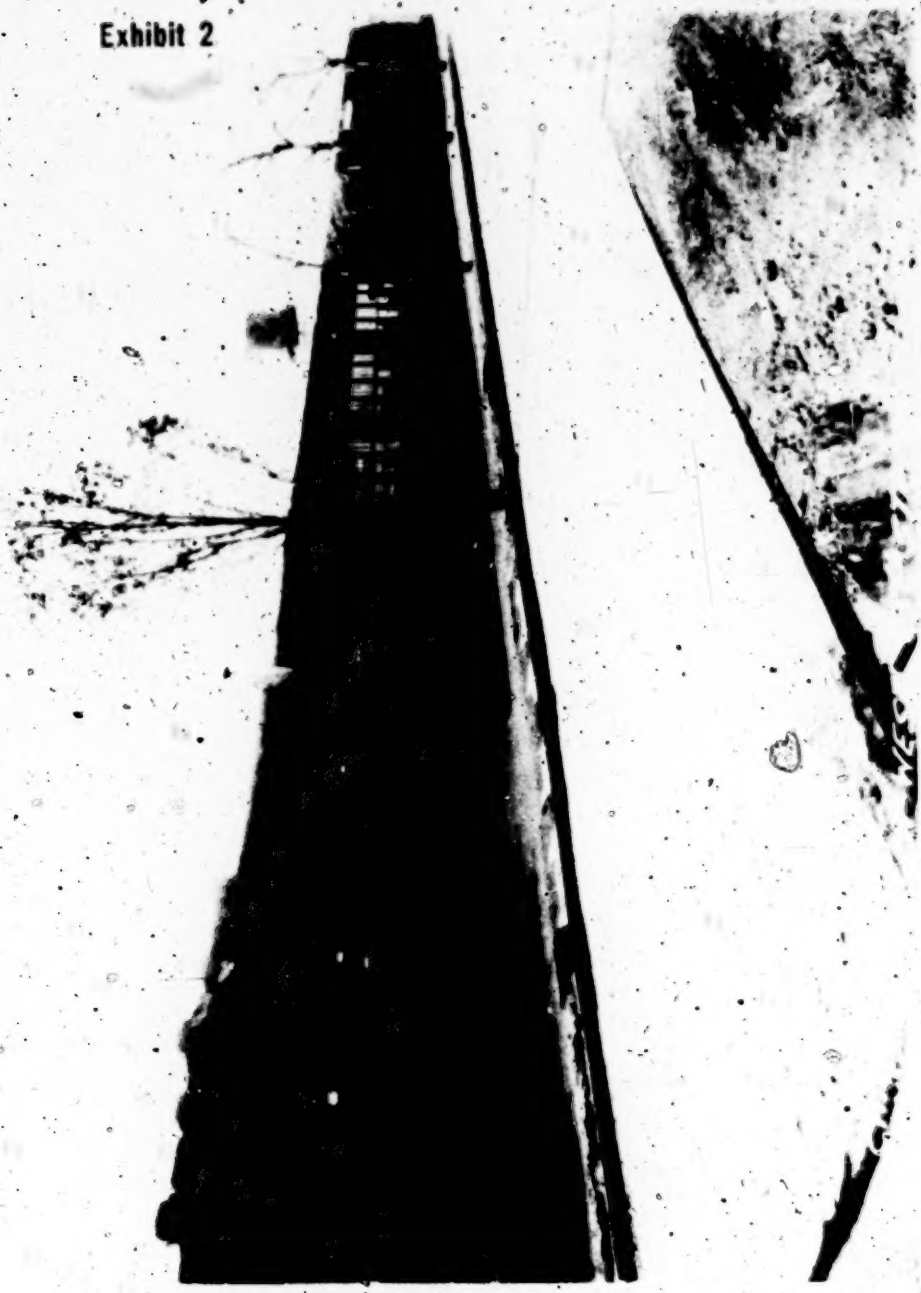
LAND

312 square feet @ 60¢ per square foot $187,277.40

IMPROVEMENTS

Modern, 1-story, brick and mill constructed building, truss roof, overhead skylight, concrete floor, sprinklered, equipped, low-pressure heating plant, adequate offices, truck loading docks, and an ex-

Exhibit 2



tensive system of switch tracks and concrete platforms to accommodate 50 cars at one setting,—tracks connected with The Belt Railway of Chicago. Floor area: 200,000 square feet @ $1.70 per square foot	340,000.00
Total valuation	527,277.40

90 Based on rental percentage of 15% of value equals $79,091, or 39½¢ per square foot, G. M. to pay taxes, insurance and general outside maintenance. With an allowance of 4¢ per square foot for heating the premises, this would be equivalent to a rental of 43½¢ per square foot, heated and maintained, which figure, for the 102,167 square feet in question, would represent a justifiable rental of $44,442.64 per annum.

In order to substantiate the above valuation, the writer has checked the original lease on this property and finds that under the purchase option contained in said lease, the improvements were given a value of $498,994, and on the basis of a depreciation allowance of 2½% per annum for 13 years, this would indicate a present-day value of $336,820.95, plus the above-mentioned land value ($187,277) or a total value today of $524,097.

In the writer's opinion, the rental in effect on this property is a fair rental and thoroly justified by present market conditions and values.

This firm represented the General Motors Corporation in the negotiation of the lease with the Signal Corps.

* * * * *

QUALIFICATIONS

I, E. H. List, hereby certify that I am Vice President and Treasurer of Nicolson, Porter & List, Inc., and Secretary and Treasurer of the Chicago Industrial Appraisal Co., with offices in the Continental Illinois Bank Building, Chicago, specializing in Industrial and Business Real Estate and in the appraisal of factory, warehouse and general industrial and commercial properties; that I am 50 years of age; that I am a member of The Chicago Real Estate Board and a Past Vice President and Chairman of its Industrial Division and for the years 1934–1935 and 1937–1938 an elected member of its Industrial Appraisal Committee and re-elected for the years 1942 and 1943; that I have frequently made studies and valuations of industrial and commercial properties in Chicago and surrounding territory.

I have been actively engaged in the appraising, buying, selling and leasing of improved and vacant properties in the Chicago area for the past 20 years.

I have personally examined the above-described property and have a record of sales of other similar properties.

I have no personal interest in the property hereinbefore described, and in my opinion the fair cash market value of the property as of March 13, 1942, is as set forth herein.

Respectfully submitted,

NICHOLSON, PORTER & LIST, INC.,
E. H. LIST,
Vice Pres. & Treas.

EHL/d.

Defendant's Exhibit 3

SUMMARY OF LEASE ON BUILDING KNOWN AS 5025 W. 65TH ST., AT LAVERNE, CLEARING, ILL.

Lessor—Clearing Industrial District, Inc.

Lessee—General Motors Corporation.

Term—June 1, 1928 to May 31, 1948.

Area—195,840 sq. ft. (building area not including outside docks).

Annual Rental—$54,553.30, which together with operation and maintenance costs, which are General Motors' responsibilities, figure slightly over 42¢ per square foot per year over the years 1940-41 and 42.

Obligations of Lessee: To pay all taxes and assessments, insurance, operating costs, maintenance costs, repair and replacement costs, and alterations, etc.

92 *Defendant's exhibit 4*

OPERATING EXPENSE

5025 W. 65th St., Clearing (Chicago)

Expense	1940		1941		1942	
	Cost per sq. ft. per year	12 Months	Cost per sq. ft. per year	12 Months	Cost per sq. ft. per year	12 Months
Salaries and wages	$.05160	$10,105.55	$.04341	$8,501.09	$.04181	$8,188.24
Materials and supplies	.00033	64.88	.00034	67.98	.00020	39.35
Rent and house service	.27900	54,834.92	.28075	54,982.49	.27850	54,553.32
Power, light, water	.02655	5,572.21	.02618	5,127.81	.01878	3,678.59
Heat	.02646	5,163.20	.03315	6,492.70	.04945	9,684.16
Insurance	.00237	464.23	.00209	409.16	.00142	277.46
Taxes	.01709	3,348.06	.01155	2,262.87	.01595	3,124.33
Amortization	.01545	3,026.49	.01008	1,974.60	.01008	1,974.60
Depreciation	.00213	418.56	.00213	418.56	.00090	176.54
Maintenance and repairs	.00336	659.75	.01009	1,977.16	.00156	364.54
Misc. (realtor's commission)					.01339	2,622.29
Total 195,840 sq. ft.	.42704	83,657.85	.41977	82,215.33	.43240	84,683.42

93 *Defendant's Exhibit 6.*

SUMMARY OF SUBLEASE OF PORTION OF 5025 W. 65TH ST., AT LAVERNE, CLEARING, ILL.

Sublessor—General Motors Corporation.
Sublessee—United States of America.
Term—January 1, 1942 to June 30, 1942 and extended to June 30, 1943.
Area—102,167 sq. ft.
Annual Rental—$40,866.80, which includes heat and water and figures at the rate of 40¢ per square foot per year.
Obligations of the Sublessee:
To repair and maintain the sidetracks located to the south of the building.

In the District Court of the United States

[Caption—48126.]

Verdict

Filed Jan. 22, 1943

We, the jury, impaneled and sworn in the above-entitled cause, do find and report that the just compensation which the petitioner shall make for the taking of the property described in the petition for condemnation, for the term from June 19, 1942 to June 30, 1943, is the sum of $38,597.86.

EVERETT E. VAN HOUTEN,
Foreman.
EDWIN SCHMIDT.
DON VON DE BOGERT.
WILLIAM E. JONES.
ARTHUR E. GABEL.
IRMA KUFER.
MURIEL SMITH.
LOUISE BECK.
ALBINA HRUSKA.
BARBARA SOUSETK.
MARION MALONE.
ETHYL HALL.

94 In the District Court of the United States

[Caption—48126.]

Present: Honorable MICHAEL L. IGOE, District Judge.

Judgment

Entered Jan. 22, 1943

This being the day to which this cause was continued for further trial again come the parties by their attorneys respectively and the Jury having heard the evidence of the parties arguments of counsel and the instructions of the Court retire to their room to consider of their verdict and evidence read into open Court and upon their oath do say We the jury impaneled and sworn in the above entitled cause do find and report that the just compensation which the petitioner shall make for the taking of the property described in the petition for condemnation for the term from June 19, A. D. 1942 to June 30, A. D. 1943 is the sum of $38,597.86.

It is ordered that said verdict be filed by the Clerk of this Court and that the Jury be and is hereby discharged. It is therefore considered and ordered by the Court that the plaintiff United States of America pay to the General Motors Corporation the sum of $38,597.86 just compensation for the taking of the property described in the petition for condemnation herein.

95 In the District Court of the United States

[Caption—48126.]

Order vacating judgment

Entered Jan. 26, 1943

By Stipulation of the United States of America, petitioner herein, by J. Albert Woll, United States Attorney for the Northern District of Illinois, and Clearing Industrial District, by its attorneys, Winston, Strawn and Shaw, and Walter H. Jacobs, and General Motors Corporation, by its attorneys, Taylor, Miller, Busch and Boyden and Harry S. Benjamin.

It Is Ordered that the minute order "to enter judgment on the verdict decreeing that the United States pay the sum of $38,597.86 to General Motors Corporation" be and the same is hereby vacated.

Entered at Chicago, Illinois, this 26th day of January, A. D. 1943.

IGOE,
United States District Judge.

J. ALBERT WOLL,
J. Albert Woll,
United States Attorney.

WINSTON, STRAWN & SHAW,
WALTER H. JACOBS,
Attys. for Clearing Industrial Dist.

TAYLOR, MILLER, BUSCH & BOYDEN,
Attys. for General Motors Corporation.

96 In the District Court of the United States

[Caption—48126.]

Order re original exhibits

January 29, 1943

On motion of defendant General Motors Corporation, by its attorneys, it is ordered that leave be and the same is hereby given to withdraw its original exhibits and to substitute photostatic copies therefore and that the time for filing motion for a new trial be and the same is hereby extended until ten (10) days after the entry of final judgment herein.

In the District Court of the United States

[Caption—48126.]

Notice of motion to amend petition

Filed Feb. 1, 1943

To HARRY S. BENJAMIN, *Legal Department, General Motors Corporation, Detroit, Michigan.*

TAYLOR, MILLER, BUSCH & BOYDEN,
134 So. LaSalle St., Chicago.

WALTER H. JACOBS and WINSTON, STRAWN & SHAW,
38 So. Dearborn St., Chicago.

Please take notice that on Monday, February 1, 1943, at ten o'clock A. M., or as soon thereafter as counsel may be heard, I shall appear before the Honorable Michael L. Igoe, Judge of the United States District Court, in the room usually occupied by

him as a courtroom, in the United States Court House at Chicago, Illinois, or before any other Judge who may then and there be sitting in his place and stead, and shall move the Court for leave to file an Amendment to the Petition for Condemnation and
97 will file a Declaration of Taking and deposit the estimated compensation stated in said Declaration with the Clerk of said Court (a copy of said Amendment to the Petition for Condemnation is served herewith), at which time and place you may appear if you so see fit.

J. ALBERT WOLL,
J. Albert Woll,
United States Attorney,
450 U. S. Court House, Chicago, Illinois.

Dated at Chicago, Illinois, this 28th day of January 1943.
(Affidavit of Mailing not copied.)

IN THE DISTRICT COURT OF THE UNITED STATES

[Caption—48126.]

Order re amendment to petition

Entered Feb. 1, 1943

This cause coming on to be heard upon the motion of the United States of America, petitioner herein, by J. Albert Woll, United States Attorney for the Northern District of Illinois, upon due notice to all parties of record, and the Court being fully advised in the premises,

It is ordered, that leave be and is hereby granted the petitioner to file their Amendment to the Petition for Condemnation instanter.

Entered at Chicago, Illinois, this 1st day of February A. D. 1943.

IGOE,
United States District Judge.

98 IN THE DISTRICT COURT OF THE UNITED STATES

[Caption—48126.]

Amendment to the petition for condemnation

Filed Feb. 1, 1943

To the Honorable Judges of the District Court of the United States of America for the Northern District of Illinois:

Now come the United States of America, by J. Albert Woll, United States Attorney for the Northern District of Illinois, at

the direction of and on behalf of the Attorney General of the United States of America, and leave of Court having been first obtained, file this, their Amendment to the Petition for Condemnation herein, and respectfully represent unto the Court as follows:

That the Secretary of War has, by letter to the Attorney General of the United States, requested that the estate taken in the lands described herein be amended to:

A term for years, subject to existing easements for public roads and highways, for public utilities, for railroad and for pipe lines, said term for years expiring June 30, 1943, renewable for additional yearly periods thereafter during the existing national emergency at the election of the Secretary of War, which election shall be signified by the giving of notice at any time prior to the expiration of the term hereby taken or subsequent extensions thereof.

Wherefore, the United States of America pray as formerly.

J. ALBERT WOLL,
J. Albert Woll,
United States Attorney.

99 In the United States District Court

[Caption—48126.]

Declaration of taking

Filed Feb. 1, 1943

To the Honorable, The United States District Court:

I, Henry L. Stimson, Secretary of War of the United States, do hereby declare that:

1. (a) The lands hereinafter described are taken under and in accordance with the Act of Congress approved February 26, 1931, (46 Stat. 1421, 40 U. S. C. sec. 258 a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241); April 11, 1918 (40 Stat. 518; 50 U. S. C. sec. 171), and March 27, 1942 (Public Law 507—77th Congress), and the Act of Congress approved April 28, 1942 (Public Law 528—77th Congress), which Act appropriated funds for such purposes.

(b) The public uses for which said lands are taken are as follows:

The said lands are necessary adequately to provide for storage space and for related military purposes. Said lands include the General Motors Building, Chicago, Illinois, and have been selected

by me for acquisition by the United States for use as a signal corps depot, and for such other uses as may be authorized by Congress or by Executive Order, and are required for immediate use.

2. A general description of the lands being taken is set forth in Schedule "A" attached hereto and made a part hereof and is a description of the same lands described in the petition in the above entitled cause.

3. The estate taken for said public uses is a term for years in the lands described therein, subject to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, said term for years expiring June 30, 1943, renewable for additional yearly periods thereafter during the existing national emergency at the election of the Secretary of War, which election shall be signified by the giving of notice at any time prior to the expiration of the term hereby taken or subsequent extensions thereof.

4. A plan showing the lands is annexed hereto as Schedule "B" and made part hereof.

5. The sum estimated by me as just compensation for said land, with all buildings and appurtenances thereto, and including any and all interest hereby taken in said lands, for the term ending June 30, 1943 is set forth in Schedule "A" herein, which sum I cause to be deposited herewith in the Registry of said Court for the use and benefit of the persons entitled thereto. I am of the opinion that the ultimate award for said lands will probably be within any limits prescribed by law as the price to be paid therefor.

In witness whereof, the petitioner, by its Secretary of War, thereunto authorized, has caused this Declaration to be signed in its name by said Henry L. Stimson, Secretary of War, this the 19th day of January, A. D. 1943, in the City of Washington, District of Columbia.

HENRY L. STIMSON,
Secretary of War of the United States.

Schedule "A"

The land which is the subject matter of the Declaration of Taking aggregates 93,673 square feet, more or less, situate and being in the County of Cook, State of Illinois. A description of the land taken, together with the names and addresses of the purported owners thereof and a statement of the sum estimated to be just compensation therefor is as follows:

Description.—93,673 square feet of floor space, in the premises known and described as 5001 West 65th Street and 6510 to 6540

South Lavergne Avenue, and being the Westerly portion of
101 the one story building located at the Southwest corner of 65th Street and Lavergne Avenue, in the City of Chicago, Cook County, State of Illinois, and being that portion of the one story building not presently under lease to the United States.

Names and addresses of purported owners—Clearing Industrial District, Inc., a Delaware Corporation, 38 South Dearborn Street, Chicago, Illinois, General Motor Corporation (lessee) a Delaware Corporation, Argonaut Realty Division, Detroit, Michigan.

Estimated compensation for the term commencing June 8, 1942 and ending June 30, 1943—$34,761.66.

Schedule "B"

Name of owner: Clearing Industrial District, Inc.

Field work by: Harry S. Cutmore & Associates, Inc.

Date: 12/11/42.

Description of tract: Part of SW¼NE¼, Sec. 21, T38 N, R. 13 E. of 3d P. M. Cook Co., Illinois.

(See Schedule "A" for detailed legal description.)

(Herein was included a drawing made to scale describing the above tract.)

I certify that this is an accurate map of tract _____, based on Legal Description which shows this tract to contain 7.1 acres.

R. B. OGDEN.
Name
Assoc. Eng.
(Title)
January 5, 1943
(Date)

102 IN THE DISTRICT COURT OF THE UNITED STATES

[Caption—48126.]

Order for disbursement

Entered Feb. 12, 1943

This cause coming on to be heard upon the motion of General Motors Corporation, defendant herein, by its attorneys, Taylor, Miller, Busch & Boyden, and Harry S. Benjamin, upon due notice to all parties of record, and the Court being fully advised in the premises,

It is ordered that the Clerk of this Court disburse on account of the just compensation to make in this proceeding. To: General

Motors Corporation—$34,761.66, without prejudice to any rights of the General Motors Corporation, including the right of appeal.

Entered at Chicago, Illinois, this 12th day of February A. D. 1943.

IGOE,
United States District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES

[Caption—48126.]

Judgment

Entered Feb. 12, 1943.

This cause having come on for trial, upon due setting, and the United States of America, petitioner herein, having appeared in open Court by Clarence W. Beatty, Jr., Special Assistant to the United States Attorney for the Northern District of Illinois, J. Albert Woll, and the defendant, General Motors Corporation, having appeared by Preston Boyden, of the firm of Taylor, Miller, Busch & Boyden, and Harry S. Benjamin, its attorneys, and the defendant, Clearing Industrial District, Inc., having appeared by Walter H. Jacobs, of the firm of Winston, Strawn and Shaw, its attorneys, and a jury having been selected, empaneled, and sworn, and having heard the evidence adduced, the arguments of counsel, and the instructions of the Court, returned its verdict fixing the just compensation for the taking of the leasehold interest in the property described in the petition for condemnation for a term from June 19, 1943 to June 30, 1943, in the sum of $38,597.86; and

103

Upon the motion of the petioner, the United States of America, by their attorney, to enter judgment on the verdict, the Court

Finds: That said cause has been regularly conducted, and that this Court has jurisdiction of the property described and the parties named herein, and that pursuant to the order entered herein on June 8, 1942, the defendant, General Motors Corporation, was deprived of its possession of said property on June 19, 1942; and that by reason of the delay in payments for the use and occupancy of said property as a matter of law, the amount of the compensation shall bear interest as hereinafter adjudged.

Now, therefore, the Court being fully advised in the premises,

It is ordered, adjudged, and decreed by the Court that the just compensation which the United States of America shall make for the taking of the real estate described herein for the term from June 19, 1942 to June 30, 1943, including heat and water, is the

sum of $38,597.86, together with interest at the rate of 5% per annum on the amounts of the rent for the months of 1942 and from the dates, viz.:

$1,128.66	June	July 1, 1942
3,122.43	July	August 1, 1942
3,122.43	August	September 1, 1942
3,122.43	September	October 1, 1942
3,122.43	October	November 1, 1942
3,122.43	November	December 1, 1942
3,122.43	December	January 1, 1943

to January 31, 1943.

It is further ordered, adjuged, and decreed by the Court that this judgment is satisfied to the extent of the sum of $34,761.66, the amount of the estimated compensation for the term commencing June 8, 1942 and ending June 30, 1943, deposited
104 in the Registry of this Court at the time of the filing of the declaration of taking herein, and

It is further ordered that upon the payment of the sum of $3,836.20, together with said interest, this judgment shall be satisfied in full.

It is further ordered that jurisdiction of this case is retained for the purpose of ascertaining the compensation for any damages to the property caused by the use of the United States of America, its officers, agents, and employees, which are in excess of ordinary wear and tear upon said property.

Entered this 12th day of February A. D. 1943.

IGOE,
United States District Judge.

To the allowance of interest and reservation of jurisdiction, the United States of America, by counsel, duly objects and excepts.

To all of which General Motors Corporation, defendant herein, by its counsel, duly objects and excepts.

In the District Court of the United States

[Caption—48126.]

Motion for new trial

Filed Feb. 23, 1943

Defendant, General Motors Corporation, moves the court to set aside the verdict returned in the above entitled cause on January 22, 1943, and the judgment entered thereon on February 12, 1943, and to grant defendant a new trial on the following grounds:

1. The court erred in refusing to admit evidence of the expenses incurred by the defendant, General Motors Corporation, with reference to wages and salaries, freight expenses, separation and vacation allowance expenses, the cost of materials and supplies, traveling expenses, telephone and telegraph charges, rental of storage facilities and destruction of bin equipment, all of
105 which directly resulted from the taking by the United States of America of the leasehold interest of General Motors Corporation in the premises involved in the above action.

2. The court erred insustaining the objection of the petitioner, United States of America, to the offer of the defendant, General Motors Corporation, to prove that said defendant incurred certain expenses for wages, salaries, freight, separation and vacation allowances, materials, supplies, telephone, telegraph, traveling, rental and storage, and expense resulting from the destruction of certain bin equipment, all of which directly resulted from the taking by the United States of America of the leasehold interest of General Motors Corporation in the premises involved in the above action.

3. The court erred in refusing to instruct the jury, as requested by the defendant, General Motors Corporation, in accordance with the following instructions which were refused by the court:

"The court instructs the jury that in all cases where private property has been taken for public use, as has been done in the present instance, the compensation to which the lessee whose interest has been taken is entitled is the amount of money necessary to put the lessee in the same condition and position as it would have been had its property not been taken."

"The jury are instructed that the respondent, General Motors Corporation, is entitled to just compensation, which is that sum of money which would reimburse it for the expenses reasonably and necessarily incurred as a result of the taking of its interest in the condemned property; and you are further instructed that, in arriving at that sum you are entitled to consider the value of the leasehold interest, and the reasonable and necessary expenses incurred in the forced demolition of its property and in moving."

"The court instructs the jury that in determining the costs of moving respondent's business and the direct damage to respondent's property, both of which are part of the just compensation to which General Motors Corporation is entitled under the Constitution, you may take into consideration salaries, wages, freight, and other expenses which were reasonably incurred by respondent and which were the direct result of the condemnation you are here considering."

106 "The jury are instructed that, in arriving at the just compensation to be awarded to the defendant herein, you are to consider what it has lost as a result of this action on the part of the government and you are not to base your considerations and deliberations upon what the government has gained thereby."

4. In view of the fact that the jury was not permitted to consider the offered evidence, testimony, and jury charges, pertaining to the tiems and subjects mentioned in paragraphs "1", "2" and "3" of this motion for new trial, the amount of the verdict is inadequate and does not fulfil the requirement of the Fifth Amendment of the Constitution of the United States of Ainerica that there be just compensation for property taken for public use.

PRESTON BOYDEN,
HARRY S. BENJAMIN, JR.,
Attorneys for Defendants, General Motors Corporation.

In the District Court of the United States

[Caption—48126.]

Order overruling motion for new trial

February 23, 1943

It is ordered by the Court that the motion of the defendant General Motors Corporation to grant a new trial be and the same is hereby overruled.

107 In the District Court of the United States for the Northern District of Illinois, Eastern Division

No. 48126

UNITED STATES OF AMERICA, PETITIONER

vs.

93.673 SQUARE FEET OF FLOOR SPACE, MORE OR LESS, IN CHICAGO, COOK COUNTY, ILLINOIS, CLEARING INDUSTRIAL DISTRICT, INC., GENERAL MOTORS CORPORATION AND ARGONAUT REALTY DIVISION, DEFENDANTS

Notice of appeal

Filed May 12, 1943

Notice is hereby given that General Motors Corporation, defendant above named, hereby appeals to the Circuit Court of Ap-

peals for the Seventh Circuit from the final judgment entered in this action on February 12, 1943.

Dated May 12, 1943.

PRESTON BOYDEN,
HARRY S. BENJAMIN,
HENRY M. HOGAN,
Attorneys for Appellant.

HENRY M. HOGAN,
Detroit, Michigan,

TAYLOR, MILLER, BUSCH & BOYDEN,
134 South LaSalle Street, Chicago, Illinois,
Of Counsel.

108 In the District Court of the United States

[Caption—48126.]

Statement of points

Filed May 17, 1943

The points upon which appellant intends to rely on this appeal are as follows:

(1) The Court erred in refusing to admit evidence of the expenses incurred by the defendant, General Motors Corporation, with reference to wages and salaries, freight expenses, separation and vacation allowance expenses, the cost of materials and supplies, traveling expenses, telephone and telegraph charges, rental of storage facilities, destruction of bin equipment and other miscellaneous expense, all of which directly resulted from the taking by the United States of America of the leasehold interest of General Motors Corporation in the premises involved in the above action.

(2) The Court erred in sustaining the objection of the petitioner, United States of America, to the offer of the defendant, General Motors Corporation, to prove that said defendant incurred certain expenses for wages, salaries, freight, separation and vacation allowances, materials, supplies, telephone, telegraph, traveling, rental and storage, and expense resulting from the destruction of certain bin equipment, all of which directly resulted from the taking by the United States of America of the leasehold interest of General Motors Corporation in the premises invoived in the above action.

(3) The Court erred in refusing to instruct the jury, as requested by the defendant, General Motors Corporation, in accord-

ance with the following instructions which were refused by the Court:

"The court instructs the jury that in all cases where private property has been taken for public use, as has been done in the present instance, the compensation to which the lessee whose interest has been taken is entitled is the amount of money necessary to put the lessee in the same condition and position as it would have been had its property not been taken."

"The jury are instructed that the respondent, General Motors Corporation, is entitled to just compensation, which is that
109 sum of money which would reimburse it for the expenses reasonably and necessarily incurred as a result of the taking of its interest in the condemned property; and you are further instructed that, in arriving at that sum, you are entitled to consider the value of the leasehold interest, and the reasonable and necessary expenses incurred in the forced demolition of its property and in moving."

"The court instructs the jury that in determining the costs of moving respondent's business and the direct damage to respondent's property, both of which are part of the just compensation to which General Motors Corporation is entitled under the Constitution, you may take into consideration salaries, wages, freight and other expenses which were reasonably incurred by respondent and which were the direct result of the condemnation you are here considering."

"The jury are instructed that, in arriving at the just compensation to be awarded to the defendant herein, you are to consider what it has lost as a result of this action on the part of the government and you are not to base your considerations and deliberations upon what the government has gained thereby."

(4) The Court erred in overruling the motion of defendant, General Motors Corporation, for a new trial.

PRESTON BOYDEN,
HENRY M. HOGAN,
HARRY S. BENJAMIN,
Attorneys for Appellant.

HENRY M. HOGAN,
Detroit, Michigan,
TAYLOR, MILLER, BUSCH & BOYDEN,
134 South LaSalle Street, Chicago, Illinois,
Of Counsel.

110 In the District Court of the United States

[Caption—48126.]

Designation of record

Filed May 17, 1943

Appellant designates the following portions of the record, proceedings, and evidence to be contained in the record on appeal in this action:

1. All process issued in this cause;
2. Petition for condemnation filed on June 8, 1942;
3. Order entered June 8, 1942, granting immediate possession to the United States of America;
4. Appearance of Industrial District, Inc., filed June 30, 1942;
5. Appearance of General Motors Corporation, filed July 1, 1942;
6. Order entered November 23, 1942, giving Preston Boyden and Morris Leibman leave to file their appearance as additional counsel for General Motors Corporation;
7. Appearances of Preston Boyden and Morris Leibman as additional counsel for General Motors Corporation, filed November 23, 1942;
8. Pages 1 to [illegible] inclusive, of the stenographic report of the proceedings herein, two copies of which are filed herewith;
9. Petitioner's Exhibits 1 and 2 and Defendants' Exhibits 1 to 6, inclusive;
10. All instructions to the jury tendered to the Trial Court;
11. Verdict of the jury filed January 22, 1943;
12. Judgment entered upon the verdict on January 22, 1943;
13. Judgment entered January [illegible]6, 1943, vacating judgment entered upon the verdict on January 22, 1943;
14. Order entered January 29, 1943, giving leave to General Motors Corporation to withdraw its original exhibits and to substitute photostatic copies therefor, and extending time for filing motion for new trial until ten days after the entry of the final judgment;
15. Notice filed herein on February 1, 1943 by the United States Attorney;

111 16. Motion of United States Attorney for leave to file an amendment to petition for condemnation, filed February 1, 1943;

17. Order of February 1, 1943, giving leave to plaintiff to file instanter an amendment to the petition for condemnation;
18. Amendment to petition for condemnation filed February 1, 1943;

19. Declaration of taking filed February 1, 1943;
20. Order entered February 12, 1943, directing Clerk of Court to pay to General Motors Corporation the sum of $34,761.66;
21. Judgment order entered February 12, 1943, decreeing that the just compensation for the taking of real estate herein by the Government is $38,597.86, together with interest at the rate of 5%;
22. Motion for new trial filed February 23, 1943, by defendant, General Motors Corporation;
23. Order entered February 23, 1943, overruling motion of defendant, General Motors Corporation, to grant a new trial;
24. Notice of appeal filed on May 12, 1943;
25. Statement of points on which appellant intends to rely;
26. This designation.

PRESTON BOYDEN,
HENRY M. HOGAN,
HARRY S. BENJAMIN.

HENRY M. HOGAN,
Detroit, Michigan,

TAYLOR, MILLER, BUSCH & BOYDEN,
134 South LaSalle Street, Chicago, Illinois,
Of Counsel.

112–113 [Clerk's certificate to foregoing transcript omitted in printing.]

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the sixth day of October, in the year of our Lord one thousand nine hundred and forty-two, and of our Independence, the one hundred and sixty-seventh.

8331

GENERAL MOTORS CORPORATION, APPELLANT

vs.

THE UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

And, to wit: On the eleventh day of February 1944, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to wit:

February 11, 1944.

Before MAJOR, KERNER, and MINTON, Circuit Judges.

MAJOR, Circuit Judge. This is an appeal from a condemnation judgment, entered February 12, 1943. The suit was commenced by the United States on June 8, 1942, to acquire the temporary use of a part of defendant's warehouses needed in connection with the establishment by the War Department of a Signal Corps depot in Chicago. On January 1, 1942, the government subleased about half of the warehouse from the defendant. There is involved in this proceeding the remainder of the warehouse, or 93,673 square feet.

The building involved is a single large, one-story building, located at the southwest corner of 65th Street and Lavergne Avenue in the Clearing district. The property condemned was being used by the defendant as its master warehouse for the storage and distribution of Buick, Oldsmobile, Pontiac, and Chevrolet parts. Defendant had installed equipment on the premises costing approximately $101,000, consisting mostly of bins and other facilities for the necessary operation of its business. At the time of the taking there was located on the premises an inventory of about $50,000 of parts and machinery. About one week after the suit was filed, defendant was notified by an agent of the government that it was trespassing upon government property and if defendant did not vacate, soldiers would be called in and move defendant out on the street. The business was discontinued, and some five weeks were spent in moving the property and in preparing the space for the government's use. Much of the property could not be moved and was demolished. The expense incurred in preparing

the property for the government's use was borne by the defendant. The use condemned was for a period of one year, out of an unexpired lease of approximately six years.[1]

Authority for the condemnation is contained in Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, 50 U. S. C. A. (App.) Sec. 632, which provides: "The Secretary of War * * * may cause proceedings to be instituted * * * to acquire by condemnation any real property, temporary use thereof, or other interest therein * * * that shall be deemed necessary, for military * * * or other war purposes * * *." The petition for condemnation, in conformity with the provision just quoted, described a designated number of square feet of floor space and prayed for an order "condemning the temporary use in the real property herein described" for a term of years ending June 30, 1943.

The case was tried to a jury and the government there, consistent with its position here, proceeded on the theory that such compensation was limited to the fair market rental value of the floor space condemned. The trial court apparently accepted this theory and submitted the cause to the jury on this basis. The defendant offered certain proof, admission of which was denied by the court, as to the expense and damages attributable solely to the operation of demolition and moving necessitated by the government's taking. We do not understand defendant to contend that it was entitled to recover these expenditures as such, but that proof of the same was admissible as an element of the fair value of the property taken. Thus the sole issue is whether the defendant was entitled to offer proof as to the expense so incurred as an element of "just compensation" guaranteed by the Fifth Amendment of the Constitution of the United States.

After studying the numerous authorities called to our attention, as well as others, we are convinced that the question for decision is a difficult one. There is a scarcity of authorities dealing with a same or similar situation. We are of the view that the opposing contentions arise largely because of a failure to recognize the exact nature of the property of which defendant was deprived. The government's case is predicated upon the basis that the property taken was merely the use of naked floor space, without any consideration to the fact that defendant was in possession of and was using said space in its business as a going concern. Consistent with this theory, it is contended by the government that the measure of defendant's compensation is only the fair rental

[1] Subsequent to the trial, an amendment to the petition for condemnation was filed which changed the one-year period contemplated to that of a term for years expiring June 30, 1943, renewable for additional yearly periods thereafter during the existing national emergency, at the election of the Secretary of War. We do not understand, however, that this amended petition has any bearing upon the issues before the court below or here.

value of such space in its naked form. In other words, according to the government's theory, and it was so argued before this court, the measure of compensation in a case of this character is the same whether the floor space taken be occupied or vacant. This theory, no doubt, is consistent with the use procured by the government, but not that which was taken from the defendant. In this connection, it must be kept in mind that it was defendant's use which was condemned and not merely a one-year part of its term lease. This is so even though defendant's interest in the property stemmed from the lease. It may also be noted that defendant had something more than the right to use, as would be the case where the property of a lessee was unoccupied. Here, the right to use had been exercised and such right was merged in the actual and physical possession of the property. The pertinency of this discussion resides in the fact that compensation is to be measured by the condemnee's loss, that of which he is deprived, and not by the taker's gain, that which he acquires. *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 281; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 76.

We agree with the lower court's characterization of the government's theory as "hard law." We go further and express the view that it should not be accepted in the absence of definite and controlling authority. The government cites many cases in support of principles usually applicable in condemnation suits. None of them, however, are based upon the unusual facts of the instant case with the possible exception of *Gershon Bros. Co.* v. *United States*, 284 Fed. 849. It would unduly prolong our discussion to analyze and distinguish such cases. We shall refer to only a few of the more important. Much stress is placed upon the recent case of *United States* v. *Miller et al.*, 317 U. S. 369. It is true the court in that case applied the generally accepted concept of market value. In doing so, however, it appears to have recognized cases requiring a different test. On page 373, the court stated:

"It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose."

The court also, on the same page, in discussing the "just compensation" clause of the Constitution, said:

"Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken."

In support of this statement, a number of cases are cited in the footnote, including *Seaboard Airline Ry. Co.* v. *United States*, 261 U. S. 299, and *United States* v. *New River Collieries Co.*, 262 U. S. 341. In the latter case, the government requisitioned bituminous

coal for use in the Navy. The court, in discussing just compensation, on page 345 said:

"The owner was entitled to what it lost by the taking. That loss is measured by the money equivalent of the coal requisitioned. * * * The owner had a right to sell in that market (export market), and it is clear that it could have obtained the prices there prevailing for export coal. It was entitled to these prices."

In the *Seaboard* case, the court (page 304), in stating the same general rule, said it was based on "equitable principles" and added:

"He (condemnee) is entitled to the damages inflicted by the taking. (*Northern Pacific Ry. Co.* v. *North American Tel. Co.*, 230 Fed. 247.)"

In the *Northern Pacific* case, the Telegraph Company sought to take from the Railway Company the right to use the latter's right of way for a telegraph line. The court, after determining that there was no market value for such lease or use of the Railway Company's right of way, on page 372 stated:

"Now, where real property about to be taken by condemnation has no market value, the amount of rent, or of income it has produced, and is producing, and is capable of producing, and the opinions of men who have had experience in dealing in it and have knowledge of its value, are competent and material evidence to determine what is just compensation for its taking; in other words, what damages will be inflicted by that taking?"

Other cases where the fair market value rule has been applied are those of *Olson* v. *United States*, 292 U. S. 246, 255, and *United States* v. *Meyer*, 115 Fed. (2d) 387, 397, both of which recognize that the condemnee is entitled to be put in as good position pecuniarily as if his property had not been taken. Cases are also cited wherein it has been held expenses incurred by an owner in moving his personal property or business from the premises condemned are not compensable. *Joslin Co.* v. *Providence*, 262 U. S. 668, 675; *Potomac Elec. Power Co.* v. *United States*, 93 Fed. (2d) 243, 249; *Futrovsky* v. *United States*, 66 Fed. (2d) 215, 216. All of these cases involved the condemnation of land and no doubt are authority for the government's position under a similar state of facts. In both the *Potomac* and *Futrovsky* cases, however, the rule was applied on the theory that the fixtures could be removed without substantial injury either to the real estate (the property taken) or to the fixtures.

Mitchell v. *United States*, 267 U. S. 341, 345, and *Bothwell* v. *United States*, 254 U. S. 231, are cited in support of the proposition that neither damages to nor complete destruction of a business conducted on the premises taken constitutes a taking of property. In each of these cases, it was land which was taken, and it was

held that the damage to the business was consequential to which the condemnee was not entitled. The court in the *Mitchell* case, however, stated (page 344):

"The special value of land due to its adaptability for use in a particular business is an element which the owner of land is entitled, under the Fifth Amendment, to have considered in determining the amount to be paid as the just compensation upon a taking by eminent domain."

The government cites a number of authorities in support of its theory that the rule of fair market value should be applied in ascertaining the value of a leasehold interest. We have examined such cases and think *Gershon Bros. Co.* v. *United States*, 284 Fed. 849, is the only one which supports such theory. Admittedly, the facts of that case are quite similar to those here. Warehouse space held and occupied by the condemnee under a lease was requisitioned by the government. The plaintiff sought to recover, in addition to the fair rental value of the property taken, the alleged difference in rent between the premises vacated and those into which plaintiff moved, the amount of expense of moving plaintiff's stock from one warehouse to the other, and for other incidental expense incurred in moving. The court (page 850) held:

"The 'just compensation' to which the plaintiff was entitled is measured by the market value of its property taken. It was not entitled to more than that because its expenses were increased in consequence of moving its business to another place."

In our view, this statement is unsound for the reason that it fails to take into account the nature of the property of which the condemnee was deprived. Evidently the court treated the property taken as merely a lease, or at any rate, the right of use in unoccupied property. So far as the facts are disclosed by the opinion, the property taken from the condemnee, however, was the actual use and possession as distinguished from a right to use.

The Federal cases relied upon by the defendant are little, if any, more helpful than those relied upon by the government. Its strongest point perhaps lies in the general principle stated in the *Miller* and other cases, *supra*, to the effect that the condemnee is to be put in as good position pecuniarily as he would have occupied if his property had not been taken. A number of cases are cited, however, wherein the cost of removing personal property has been allowed, either as a measure of compensation or as an element thereof. Among such cases are *National Laboratory and Supply Co.* v. *United States*, 275 Fed. 218; *United States* v. *Wiener*, 210 Fed. 832; *C. M. & St. P. Ry. Co.* v. *Hock*, 118 Ill. 587; *Metropolitan West Side Elev. R. Co.* v. *Siegel*, 161 Ill. 638; *McMillin Printing Co.* v. *Pittsburgh C. & W. R. Co.*, 216 Pa. 504, 65 Atl.

1091; and *Des Moines Wet Wash Laundry* v. *Des Moines*, 197 Iowa 1082, 198 N.W. 486. It is true, as the government points out in the *National Laboratory* case, the court merely followed the measure of damages invoked by the parties. The *Wiener* case has little relevancy to the instant question, but, strange as it may seem, the government there urged that the only damage to the owners of the plant condemned was the expense of taking the machinery down, removing it and setting it up in a new location. We realize, in view of what was said in the *Miller* case, *supra* (page 379), that State court decisions are not controlling, but in the absence of a more definite Federal rule applicable to the instant situation, we think they are worth noting.

In the *Hock* case, the court (page 590) stated:

"The inconvenience and cost of removal of the business from the premises condemned, are mentioned as elements of damages proper for consideration. This, however, is in harmony with the ruling in *St. Louis, Vandalia, Terre Haute Railroad Company* v. *Capps*, 67 Ill. 607."

In the *Siegel* case, the same court (page 618) said:

"If * * * the loss and expense of removal enter into and help to make up the market value when the sale is voluntary, we see no reason why the same elements should not help to make up the market value when the sale is compulsory."

The government contends that these cases have been discredited by a later decision of the same court in *Braun* v. *Metropolitan West Side Elev. R. R. Co.*, 166 Ill. 434. This characterization is hardly accurate. True, the court in the latter case pointed out that its previous decisions in the *Hock* and *Siegel* cases were the result of the theory on which the cases were tried in the courts below. The court, however, after stating the fair market rule, recognizes exceptions thereto by stating (page 438):

"* * * and whenever a consideration of matters of personal inconvenience to the owner, loss of profits, damage to personal property and cost of removal, is permissible, it must be when a sufficient foundation therefor has been laid, so that their consideration simply aids the jury and court in determining the fair cash value of the property, in view of its present use. There is nothing in this case to bring it within any exception to the general rule."

In that case, only a part of a tract of land was condemned and the court thought there was no showing that the condemnee's business could not be conducted upon that portion not taken, and for this reason the exception to the general rule could not be given effect.

Of the cases cited by the defendant, the *McMillin* case is the nearest in point. After stating the general fair market rule, the court said (page 1094, Atl.):

"But market value is an unsatisfactory test of the value to a tenant of a leasehold interest. It is really no test at all because a lease rarely has any market value. Generally it is not assignable at the will of the tenant, and he pays in rent all that the right of occupation is worth. The right of which he is deprived, and for which he is entitled to full compensation is the right to remain in undisturbed possession to the end of the term. The loss resulting from the deprivation of this right is what he is entitled to recover. The value of the right he is forced to sell cannot ordinarily be measured by its market price, for there is no market for it; nor can it always be measured by the difference between the rent reserved and the rental value, if the lease should be a favorable one. If, as was the case here, a tenant, engaged in a business requiring the use of heavy machinery and appliances, should secure a new place equally well adapted to his business, and at the same rent, he would still be at the expense of removal and at a loss because of the stoppage of his business. These are matters to be considered in connection with others, not as substantive elements of damage, but as tending to prove the value of the leasehold interest."

Again, as pointed out by the government, this case was tried in the court below on the theory that the cost of removing machinery should be allowed. The government also suggests that the *McMillin* case is of doubtful validity due to a later decision of the same court, *Iron City Auto Co.* v. *Pittsburgh*, 253 Pa. 478, 98 Atl. 679. We do not so read this latter case; in fact, the court appears to have reaffirmed the *McMillin* case. On page 681 (Atl.), the court, in discussing the *McMillin* case, stated:

"* * * the tenant was allowed to recover the expenses of the compulsory removal of machinery. We did not, however, permit this as a separate 'item' of damage, but merely as 'a proper element' to be considered in fixing the value of the leasehold. In other words, our underlying thought appears to have been: If a purchaser had appeared upon the scene to take over the lease, the fact that the holder thereof would be obliged to remove the business with the machinery to another location would, of course, cause the prospective lessee to diminish his bid for the balance of the term accordingly; hence the cost of removal and the depreciation in value of the machinery were proper elements for consideration and deduction in measuring the value of the lease."

It is pertinent to observe that the unfairness of applying the fair market rule in the instant case is even more apparent than in the *McMillin* case, for the reason that the use condemned here is only for one year out of a lease which had five years more to run, while there the entire lease was taken.

Another case based on facts similar to those of the instant case is that of *Des Moines Wet Wash Laundry* v. *Des Moines*, 197 Iowa 1082, 198 N. W. 486. In discussing the question, the court said (page 488 N. W.):

"The real right of which plaintiff is deprived in the exercise of eminent domain by the defendant, and for which, under the Constitution of the state, he is entitled to be compensated, is the right to remain in undisturbed possession and enjoyment to the end of the term.

"'The loss resulting from the deprivation of this right is what he is entitled to recover. The value of the right he is forced to sell cannot ordinarily be measured by its market price, for there is no market for it; nor can it always be measured by the difference between the rent reserved and the rental value, if the lease should be a favorable one. If, as was the case here, a tenant, engaged in a business requiring the use of heavy machinery and appliances, should secure a new place equally well adapted to his business, and at the same rent, he would still be at the expense of removal and at a loss because of the stoppage of his business. These are matters to be considered in connection with others, not as substantive elements of damage, but as tending to prove the value of the leasehold interest.'"

A pertinent observation is found in *United States* v. *Rocktold Co.*, 129 Fed. (2d) 473, 476, where the court quoted from a New York Court of Appeals case written by Judge Cardozo, as follows:

"'Condemnation' is an enforced sale, and the state stands toward the owner as buyer toward seller. On that basis the rights and duties of each must be determined. It is intolerable that the state, after condemning a factory or warehouse, should surrender to the owner a stock of second-hand machinery and in so doing discharge the full measure of its duty."

Phelps v. *United States*, 274 U. S. 341, is also worth noting, not so much because of what was decided as the proof which was considered in determining just compensation. There, the property condemned was the use of a pier in New York harbor held by the condemnee under a lease. The Supreme Court opinion discloses that the condemnee continued to pay rent to its lessor in the amount of $79,890.42, which was repaid to the condemnee by the United States. The condemnee, in addition, was allowed so much per month for the use of its property, in the amount of $254,175.79 over the amount of rent actually paid. The only question before the Supreme Court was whether the condemnee was entitled to interest from the time of taking or from the time of payment. The court decided it was from the time of taking, on the theory that the condemnee was "entitled to have the full equivalent of the value of such use at the time of the taking paid contemporane-

ously." This case went to the Supreme Court from the Court of Claims as *Howard Phelps, et al.*, 61 Ct. Cls. 1044. The facts regarding the case, however, and the basis for that court's decision are found in *Booth & Co.* v. *United States*, 61 Ct. Cls. 895. The findings describe the property taken, the terms and conditions of the lease, including the amount of rental the lessee (condemnee) was obliged to pay, the size of the pier and its facilities for accommodating ships. The findings also disclose the amount received by the condemnee from steamship companies for the use of the pier prior to the taking, as well as the amount received during the remainder of the year after the property was returned by the government to the owner. It was, therefore, upon the basis of the condemnee's income, both prior to the taking and after the property had been returned, that the fair value of the use taken was fixed and determined. The Court of Claims approved the award as thus determined, although, as stated, its propriety was not raised in the Supreme Court. The significant thing about these facts, so we think, is that the property taken was recognized by the government as the condemnee's use and its occupancy in the conduct of its business, and it was that use, as distinguished from a mere interest in the lease, for which compensation was awarded. No contention was made that just compensation should be limited to the fair rental value of the space condemned.

While we recognize that the question for decision is not free from doubt, we are of the view that fair rental value of the unoccupied space taken was not the equivalent of "just compensation," to which defendant was entitled. To so hold is to ignore that which was taken from the defendant, its use and occupancy of the premises. Suppose the defendant and the government had entered into a lease voluntarily. Certainly the cost of preparing the space for the government's use would have been a material item in the amount of rent agreed upon. If that cost had been borne by the defendant the government no doubt would have been willing to pay more rental, and if it had been borne by the government, defendant, for the same reason, would have been willing to accept less. We are unable to perceive why such cost should not also be taken into consideration where the acquisition is the result of condemnation. While we think that the fair market rental value of the unoccupied space was properly admissible as an element of such compensation, to hold that the defendant was entitled to nothing more is to hold that it was merely entitled to be relieved of the rental obligation owed to its lessor. This plainly ignores that which was taken from the defendant and is inequitable as well as unjust.

We, therefore, reach the conclusion that the defendant was entitled to prove, as an element of "just compensation," the actual

and necessary expense directly incurred in vacating the property condemned. It follows that defendant's offer of proof in this respect was erroneously excluded, and that the judgment must be and is hereby

Reversed.

MINTON, Circuit Judge, Dissenting. I cannot agree that the Government should be liable for the moving expense of the appellant. Dress the question up as you will, that is all that it amounts to.

That this case may be properly classified as one of "hard law" is no justification for departing from the true objective of a condemnation suit, namely, to fix the fair market value of the property taken.

In the case before us there was a going business, operating at a place, the warehouse. The Government took, for a time, the place, and not the business. The removal of the business was an expense that was consequential and was not an element of value of the warehouse taken.

I have never understood that the condemnor could be held liable for expense which the condemnee was put to in vacating the premises. The cases are against such an allowance. *Gershon Bros. Co.* v. *United States*, 284 Fed. 849; *City of St. Louis* v. *St. Louis, I. M. & S. Ry. Co.*, 266 Mo. 694, 182 S. W. 750; *Matter of New York, W. S. & B. Ry. Co.*, 35 Hun 633; *Mayor of Baltimore* v. *Gause & Bro.*, 132 Md. 290, 104 Atl. 429; *Rublet* v. *Concord Railroad Corp.*, 62 N. H. 561.

Let us suppose that the Government had in this case condemned the fee. It would have been liable to pay the fair market value of the fee taken. Would the Government have had to pay the appellant's moving expense? The majority concedes that it would not. With this, I agree. The cases support this view. *Joslin Mfg. Co.* v. *City of Providence*, 262 U. S. 668, 675, 43 S. Ct. 684, 67 L. Ed. 1167; *Potomac Electric Power Co.* v. *United States*, 85 F. 2d 243, 249; *Kutrovsky* v. *United States*, 66 F. 2d 215, 217. By what process of reasoning can it be said that the Government must pay that expense if it takes less than the fee?

The Government did not take the bins and other personal property which the appellant removed. That they might have been worth less after removal than when installed and that certain expense was incurred in their removal are no criteria of the value of the thing taken, namely, the warehouse space.

The Government is required to make the condemnee whole for the property taken, but not for the expense of getting out. The use to which property is being put, or could be put, is a proper consideration for court or jury in arriving at the market value,

but such use is not the thing taken. The taking may interrupt the business conducted on the premises, but that does not add to or detract from the value of the thing used. It is the thing used, namely, the warehouse space, that was taken, and not the use of the thing, namely, the business conducted in the warehouse. We seek the value of the thing used, not the value of the use of the thing. The expense of relinquishing the use of the thing from the thing used is not compensable as an element of value of the thing taken.

The judgment should be affirmed.

A true Copy.

Teste:

_____,

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

And on the same day, to wit: On the eleventh day of February 1944, the following further proceedings were had and entered of record, to wit:

Friday, February 11, 1944

Court met pursuant to adjournment.

Before: Hon. J. Earl Major, Circuit Judge. Hon. Otto Kerner, Circuit Judge. Hon. Sherman Minton, Circuit Judge

The United States of America, plaintiff

vs.

93,673 Squale Feet of Floor Space, etc., et al., defendants

8331

General Motors Corporation, appellant

vs.

The United States of America, appellee

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, reversed, and that this

cause be, and the same is hereby, remanded to the said District Court.

I, KENNETH J. CARRICK, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages contain a true copy of the Opinion filed on the eleventh day of February 1944, and the Judgment entered on the same day, in:

Cause No. 8331

GENERAL MOTORS CORPORATION, APPELLANT

vs.

THE UNITED STATES OF AMERICA, APPELLEE

As the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-first day of April A. D. 1944.

[SEAL]

KENNETH J. CARRICK,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1944

126 Supreme Court of the United States

Order allowing certiorari

Filed May 29, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice and Mr. Justice Murphy took no part in the consideration or decision of this application.

[Endorsement on cover:] File No. 48455. U. S. Circuit Court of Appeals, Seventh Circuit. Term No. 76. The United States of America, Petitioner *vs.* General Motors Corporation. Petition for a writ of certiorari and exhibit thereto. Filed May 3, 1944. Term No. 76 O. T. 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

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CHARLES ELMORE CROPLEY
CLERK

No. [redacted] 76

In the Supreme Court of the United States

OCTOBER TERM, 1943

UNITED STATES OF AMERICA, PETITIONER

v.

GENERAL MOTORS CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Reasons for granting the writ	5
Conclusion	11
Appendix	12

CITATIONS

Cases:	
Bothwell v. *United States*, 254 U. S. 231	7
Braun v. *Metropolitan West Side Elevated R. R. Co.*, 166 Ill. 434	8
Central Pac. R. R. Co. v. *Pearson*, 35 Cal. 247	8
Chicago, M. & St. P. Ry. Co. v. *Hock*, 118 Ill. 587	8
County of Los Angeles v. *Signal R. Co.*, 86 Cal. App. 704	8
Des Moines W. W. Laundry v. *City*, 197 Iowa 1082	8
Fiorini v. *Kenosha*, 208 Wis. 496	8
Futrovsky v. *United States*, 66 F. (2d) 215	5, 8
Gershon Bros Co. v. *United States*, 284 Fed. 849	5, 6
In re Assessment for Widening Third St., St. Paul, 176 Minn. 389	8
Iron City Auto. Co. v. *Pittsburgh*, 253 Pa. 478	8
James McMillin Printing Co. v. *Pittsburgh, C. & W. R. Co.*, 216 Pa. 504	8
Joslin Co. v. *Providence*, 262 U. S. 668	5, 7, 9
Katz Drug Co. v. *United States*, C. C. A. 8, No. 12,681	11
Matter of New York, S. W. & B. R. Co., 35 Hun 633	8
Mayor & C. C. of Balto. v. *Gamse*, 132 Md. 290	8
Metropolitan West Side Elevated R. R. Co. v. *Siegel*, 161 Ill. 638	8
Mitchell v. *United States*, 267 U. S. 341	7, 8, 9
Mullen Benevolent Corp. v. *United States*, 290 U. S. 89	7
Olson v. *United States*, 292 U. S. 246	7
Omnia Co. v. *United States*, 261 U. S. 502	7
Potomac Electric Power Co. v. *United States*, 85 F. 2d 243, certiorari denied, 299 U. S. 565	5
Ranlet v. *Railroad*, 62 N. H. 561	8
St. Louis v. *St. Louis, I. M. & S. Ry.*, 266 Mo. 694	8
Seaboard Air Line Ry. Co. v. *United States*, 261 U. S. 299	6
Springfield S. W. Ry. Co. v. *Schweitzer*, 173 Mo. App. 650	8

Cases—Continued.	Page
United States v. *Chandler-Dunbar Co.*, 229 U. S. 53	7
United States v. *Cluett, Peabody & Co.*, C. C. A. 9, No. 10,543	11
United States v. *Miller*, 317 U. S. 369	6, 7
United States v. *New River Collieries Co.*, 262 U. S. 341	6
United States v. *Petty Motor Co.*, C. C. A. 10, Nos. 2820–2826	11
United States ex rel T. V. A. v. *Powelson*, 319 U. S. 266	5, 6, 7, 9
Statute:	
Second War Powers Act of March 27, 1942, Tit. II, 56 Stat. 177, Sec. 201, 50 U. S. C. App., Sec. 632	2
Miscellaneous:	
88 Cong. Rec. 1653–1656	9, 12

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

GENERAL MOTORS CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered in this case on February 11, 1944, by the United States Circuit Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Circuit Court of Appeals (R. 114–123) is reported in 140 F. (2d) 873.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 11, 1944 (R. 124–125). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in a proceeding by the United States to acquire the temporary use of a business property, necessary expenses incurred by the lessee in vacating the premises constitute an element of "just compensation" within the Fifth Amendment.

STATUTE INVOLVED

Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, c. 199, sec. 201, 50 U. S. C. App., Supp. III, sec. 632, is set forth in the Appendix, *infra*, pp. 12–13.

STATEMENT

The United States on June 8, 1942, instituted proceedings under Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, sec. 201, 50 U. S. C. App., Supp. III, sec. 632 (Appendix, *infra*, pp. 12–13), to condemn, for a term ending June 30, 1943, a portion of a warehouse needed in connection with the establishment by the War Department of a Signal Corps depot in Chicago (R. 2–4, 83–85). An order granting immediate possession was entered on the same day (R. 5). General Motors Corporation, the lessee occupant of the premises, began moving out on June 19, 1942 (R. 69). At the trial before a jury, the sole issue was the amount of compensation to be paid for the term commencing June 19, 1942, and ending June 30, 1943 (R. 80, 93). The pertinent facts are as follows:

The warehouse was owned by the Clearing Industrial District, Inc., and had been leased to the General Motors Corporation in 1928 for a term ending May 31, 1948 (R. 91). It was used by General Motors as a master warehouse for the storage and distribution of automobile parts (R. 39). At the trial both parties introduced evidence as to the fair rental value of the property taken (R. 15, 41; cf. R. 25–27, 39, 44–45, 93). General Motors then sought to prove damages and expenses incurred in "demolishing" and moving personal property from the warehouse and relocating it elsewhere (R. 45–54).[1] An offer was made to prove that the company had installed $101,000.00 worth of equipment (storage bins and other facilities) in the warehouse; that it had an inventory of $250,000.00 worth of parts and machinery located in the warehouse at the time of the taking; and that the expenses and losses incurred in moving were $83,598.39 (R. 49–54). Included in the expenses and losses alleged to have been incurred were salaries and wages paid regular and special employees for time spent exclusively in moving (Offers of Proof Nos. 1, 3, 4, 6–12, 14–16, R. 50–52); separation and vacation

[1] The word "demolished" as used in the offer of proof referred to the dismantling of equipment and not its destruction. The property and inventory removed were not fixtures. As General Motor's offer of proof states, the property "demolished" (i. e., dismantled and removed) was "bins and other personal property" (R. 49).

allowance payments made to employees discharged and not rehired (Offer of Proof No. 2, R. 50); wages for janitors and watchmen during the moving period (Offer of Proof No. 5, R. 50); state and federal unemployment and old age benefit taxes on salaries and wages paid for moving purposes (Offer of Proof No. 13, R. 51); cost of supplies and materials purchased or on hand which were used in moving (Offers of Proof Nos. 17, 18, 20, R. 52); telephone and telegraph charges incidental to arranging for shipment of parts and accessories (Offer of Proof No. 19, R. 52); freight charges on shipment of inventory and equipment to other cities (Offers of Proof Nos. 22–30, R. 52–53); unamortized cost of installing a burglar alarm system (Offer of Proof No. 31, R. 53); cost of renting storage space for fixed assets during the term of the Government's taking (Offer of Proof 32, R. 53); value of bin equipment destroyed during removal (Offer of Proof No. 33, R. 53); cost of installing and moving fixed assets (Offer of Proof No. 33, R. 53–54).

The trial court excluded all evidence relating to the claim for removal expenses (R. 48), and rejected the respondent's offer of proof (R. 55). The jury's verdict as to the just compensation to be paid to General Motors for the taking was thus based solely upon the fair rental value of the warehouse during the period from June 19, 1942, to June 30, 1943 (R. 93; cf. R. 80–81). Judgment was entered accordingly (R. 102–104).

On appeal, the Circuit Court of Appeals reversed the judgment of the District Court. It held that General Motors was entitled to prove, as an element of "just compensation" under the Fifth Amendment, the actual and necessary expenses directly incurred in vacating the property condemned, and that the respondent's offer of proof was therefore erroneously excluded (R. 114–123). Judge Minton dissented (R. 123–124).

REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with numerous rulings, both of this Court and the lower courts, that expenses incurred by an owner or lessee in vacating condemned property are not, in the absence of statute, to be included within "just compensation." *Joslin Co.* v. *Providence*, 262 U. S. 668, 676, cited with approval in *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 282, n. 13; *Potomac Electric Power Co.* v. *United States*, 85 F. (2d) 243, 249 (App. D. C.), certiorari denied, 299 U. S. 565; *Futrovsky* v. *United States*, 66 F. (2d) 215, 216–217 (App. D. C.); *Gershon Bros. Co.* v. *United States*, 284 Fed. 849 (C. C. A. 5). In the *Joslin* case, *supra*, at 676, this Court held: "Ordinarily, the cost of removing personal property from land taken is not a proper element of damage unless made so by express statute * * *." While the court below recognized that removal expenses need not be paid when the fee simple is condemned, it

held, nevertheless, that such expenses are compensable when less than the fee is taken. In this respect its ruling directly conflicts with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Gershon Bros. Co.* v. *United States*, 284 Fed. 849 (C. C. A. 5). In the latter case the United States had also taken storage space for a temporary period. The court held that expenses incurred in moving were not compensable, and that the lessee was entitled only to the market value of the property taken. 284 Fed. at 850.

The court below explicitly refused to follow the rule applied by the Circuit Court of Appeals for the Fifth Circuit in the *Gershon* case. It held, instead, that under the decisions of this Court in *United States* v. *Miller*, 317 U. S. 369, 373, *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 304, and *United States* v. *New River Collieries Co.*, 262 U. S. 341, 345, a condemnee is entitled "to be put in as good position pecuniarily as he would have occupied if his property had not been taken" (R. 118). We submit, however, that the standard applied by the court below departs from the established principle that consequential damages and incidental losses are not compensable, unless made so by statute. See *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 281–283, and cases cited. In the *Powelson* case, *supra*, at 281–282, this Court held: "It is a well settled rule that while it is the

owner's loss, not the taker's gain, which is the measure of compensation for the property taken * * *, not all losses suffered by the owner are compensable under the Fifth Amendment. In absence of a statutory mandate * * * the sovereign must pay only for what it takes, not for opportunities which the owner may lose." And in *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 81, it was stated: "The owner must be compensated for what is taken from him, but that is done when he is paid its fair market value for all available uses and purposes."

The rule expressed in *United States* v. *Miller*, 317 U. S. 369, 373, and in the other cases relied upon by the court below, that an owner is entitled to be put in as good position pecuniarily as if his property had not been taken, does not require that he be compensated for all injuries and business losses suffered. *Mitchell* v. *United States*, 267 U. S. 341, 345; *Bothwell* v. *United States*, 254 U. S. 231; *Omnia Co.* v. *United States*, 261 U. S. 502, 508–513; *Joslin Co.* v. *Providence*, 262 U. S. 668, 676; *Olson* v. *United States*, 292 U. S. 246, 255; *Mullen Benevolent Corp.* v. *United States*, 290 U. S. 89, 94–95. "There are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment." *United States ex rel. T. V. A.* v. *Powelson, supra*, at 281. Clearly, therefore, the District Court was justified in holding that

the measure of compensation to which the respondent was entitled under the Fifth Amendment was limited to the fair rental value of the warehouse during the period from June 19, 1942, to June 30, 1943.[2]

2. In allowing compensation for a consequential loss, the court below provided a remedy which

[2] While recognizing that state law is not controlling, the court below relied upon statements of dubious authority found in several state decisions which run counter to the great weight of authority. *Chicago, M. & St. P. Ry. Co.* v. *Hock*, 118 Ill. 587 (1886); *Metropolitan West Side Elevated R. R. Co.* v. *Siegel*, 161 Ill. 638, 648–649 (1886), and *James McMillin Printing Co.* v. *Pittsburgh, C. & W. R. Co.*, 216 Pa. 504 (1907), have been discredited by subsequent decisions in the same jurisdictions. See *Braun* v. *Metropolitan West Side Elevated R. R. Co.*, 166 Ill. 434, 437–439 (1897); *Iron City Auto. Co.* v. *Pittsburgh*, 253 Pa. 478, 484–486, 493–494 (1916). In *Des Moines W. W. Laundry* v. *City*, 197 Iowa 1082 (1924), the property removed was fixtures, not personalty, and reliance was placed upon the fact that under the statute there involved the owner was entitled to "damages." However, "just compensation" under the Fifth Amendment has never been construed to include "damages." *Mitchell* v. *United States*, 267 U. S. 341, 345–346; *Futrovsky* v. *United States*, 66 F. (2d) 215, 216–217 (App. D. C.).

Although many state constitutions require compensation for consequential damages resulting from public improvements, removal costs are excluded under the decisions in the great majority of the states. *Central Pac. R. R. Co.* v. *Pearson*, 35 Cal. 247, 263 (1868); *County of Los Angeles* v. *Signal R. Co.*, 86 Cal. App. 704, 710–712 (1927); *Mayor & C. C. of Balto.* v. *Gamse*, 132 Md. 290, 296–297 (1918); *In re Assessment for Widening Third St., St. Paul*, 176 Minn. 389, 392 (1929); *St. Louis* v. *St. Louis, I. M. & S. Ry.*, 266 Mo. 694, 707 (1916); *Springfield S. W. Ry. Co.* v. *Schweitzer*, 173 Mo. App. 650, 655 (1913); *Randet* v. *Railroad*, 62 N. H. 561, 564 (1883); *Matter of New York, S. W. & B. R. Co.*, 35 Hun 633 (N. Y. 1885); *Fiorini* v. *Kenosha*, 208 Wis. 496, 499 (1932).

Congress considered and deliberately rejected. When the bill which became the Second War Powers Act was debated in the House of Representatives, the following amendment was offered: "The amount paid for any property taken shall include fair compensation for losses proximately caused by the taking in addition to the fair value of the property itself." 88 Cong. Rec. 1653. After considerable discussion this amendment was rejected. 88 Cong. Rec. 1653–1656.

The court below, admitting that the question was a "difficult one" (R. 115) and that its decision was "not free from doubt," was influenced by the belief that exclusion of removal costs would be "inequitable as well as unjust" (R. 122). We submit, however, that the question of determining the extent to which consequential damages and incidental losses should be compensated has always rested within the province of the legislatures, not the courts. Cf. *Joslin Co.* v. *Providence*, 262 U. S. 668, 676; *Mitchell* v. *United States*, 267 U. S. 341, 345–346; *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 281–284.

The present case itself discloses that the question is of such a nature as to warrant legislative rather than judicial solution. The items claimed by the respondent under the heading of removal costs cover a wide range. They include such disparate items as separation and vacation allowances paid to employees who were discharged and not rehired when the warehouse was closed down;

telephone and telegraph charges incidental to arranging for shipment of inventory and equipment; and rent incurred for storing fixed assets during the period of occupancy by the Government. In similar cases claims have been based upon the increased rentals and bonuses paid for new premises; the cost of photographs of the new location which were sent to the principal office of the company; the cost of changing advertising cuts; and the cost of paper drinking cups used by the movers. In a sense, all such claims are the inevitable consequences of vacating condemned premises, and hence compensable under the rule applied by the court below. Since there is no statute specifically delimiting the incidental expenses for which compensation may be had, the standard employed by the court below, *i. e.*, that the expenses be "actual," "necessary," and "directly incurred in vacating the property condemned" (R. 122–123), is necessarily vague and ambiguous. If such an indefinite criterion of compensation should be accepted, much confusion would inevitably ensue. We submit that the intrinsic character of the problem calls for legislative rather than judicial formulation of specific standards and limitations.

3. The question presented is one of great importance to the Government in its acquisition and use of property for war purposes. Temporary use of large amounts of property has been taken by the Government under the Second War Powers

Act. Many owners have settled their claims against the Government upon the assumption that the hitherto unquestioned principle denying compensation for removal expenses is still in effect. Many other owners are claiming such expenses.[3]

CONCLUSION

The court below has determined an important question of federal law in a manner in conflict with controlling decisions of this Court, as well as with rulings of other lower courts. It is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

MAY 1944.

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[3] Claims for removal expenses are being asserted in cases now pending in the Eighth, Ninth, and Tenth Circuits: *Katz Drug Co.* v. *United States*, No. 12,681 (C. C. A. 8); *United States* v. *Chuett, Peabody & Co.*, No. 10,543 (C. C. A. 9); and *United States* v. *Petty Motor Co.*, Nos. 2820–2826 (C. C. A. 10).

APPENDIX

Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, c. 199, sec. 201, 50 U. S. C. App., Supp. III, sec. 632, provides as follows:

> SEC. 201. The Act of July 2, 1917 (40 Stat. 241), entitled "An Act to authorize condemnation proceedings of lands for military purposes", as amended, is hereby amended by adding at the end thereof the following section:
>
> "SEC. 2. The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357), or any other applicable Federal statute, and may dispose of such property or interest therein by sale, lease, or otherwise, in accordance with section 1 (b) of the Act of July 2, 1940 (54 Stat. 712). Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used,

and improved for the purposes of this Act, notwithstanding any other law. Property acquired by purchase, donation, or other means of transfer may be occupied, used, and improved, for the purposes of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended."

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